Supreme Court, U.S.
FILED
DEC 9 1997
OFFICE OF THE CLERK

No. 97-1111

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CORY D. CHAN,

Petitioner,

v.

EDWARD S. WODNICKI, individually and in his former capacity as Deputy Superintendent of the Chicago Police Department,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

RUTH E. VANDEMARK*
RALPH N. GLADER
LAW OFFICES OF RUTH E. VANDEMARK
225 West Washington Street, Suite 2200
Chicago, Illinois 60606
(312) 419-7162

SUSAN BOGART
LAW OFFICES OF SUSAN BOGART
Ten South LaSalle Street, Suite 3505
Chicago, Illinois 60603
(312) 726-9060

Attorneys for Cory D. Chan

* Counsel of Record

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

85 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether, for purposes of defeating a defense of qualified immunity, the decisions of this Court clearly established by 1989 that the Fifth Amendment to the United States Constitution prohibits the removal, transfer, and effective demotion of a police officer in retaliation for the officer's exercising his right against self-incrimination before a federal grand jury, without an assurance of immunity, in an investigation unrelated to the police officer's professional responsibilities.

2. Whether, to defeat a defense of qualified immunity, the decisions of the Court have consistently rejected any requirement that the law existing at the time of an infringement of a constitutional right by a public official must be clearly established by factually indistinguishable precedent.

3. Whether decisions of the Court permitting adverse inferences to be drawn from the invocation of the Fifth Amendment privilege against self-incrimination in civil cases support a redefinition of the Fifth Amendment right against self-incrimination exercised by a police officer before a federal grand jury, without a grant of immunity, so that the officer's removal, transfer, and effective demotion for exercising that right can never amount to a substantial penalty that is coercive of that right.

LIST OF THE PARTIES

As was true in the United States Court of Appeals for the Seventh Circuit, the only parties to this appeal are the two individuals listed in the caption: Cory D. Chan, the plaintiff-petitioner, and Edward S. Wodnicki, the defendant-respondent. The action against the defendant was brought against him individually and in his former capacity as Deputy Superintendent of the Chicago Police Department.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

LIST OF THE PARTIES ii

TABLE OF AUTHORITIES vi

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED 1

STATEMENT OF THE CASE 2

Officer Chan's Pre-August 9, 1989 Status 3

The Defendant, Edward S. Wodnicki 3

The Grievance Proceeding 4

The Lawsuit and the District Court's Jurisdiction 4

The Defendants' Motion to Dismiss 5

The Motion for Summary Judgment 5

Certification of Frivolous Appeal 6

The Testimony and Evidence at Trial 6

The Grand Jury Appearance 7

Events After the Grand Jury Appearance 8

The Reason for Officer Chan's Removal, Transfer, and Effective Demotion 10

The CPD and the Fifth Amendment in 1989 12

The Replacement on the CTTF 12

Officer Chan's Performance Record 13

"Dumping" 14

Officer Chan's Reputation 14

Economic Consequences 14

Reinstatement Prospects 15

The Verdict 15

Judgment Notwithstanding the Verdict 15

The Opinion of the Court of Appeals 16

REASONS FOR GRANTING THE WRIT 17

I. The Writ Should Be Granted Because the Seventh Circuit's Holdings Directly Conflict with Decisions of This Court 18

A. The decisions of this Court had clearly established by 1989 that the substantial penalty found by the jury in this case violated Officer Chan's Fifth Amendment right against self-incrimination 18

B. This Court has consistently rejected a requirement that only prior case law that is factually indistinguishable clearly establishes the constitutional rights of which a reasonable person would have known 21

II. The Seventh Circuit's Compromised Fifth Amendment Right Against Self-Incrimination Is Unsupported by the Law and Is Erroneous 23

A. In the context of grand jury proceedings, civil adverse inference decisions fail to support a compromised Fifth Amendment right against self-incrimination 24

B. The Third Circuit's decision in *FOP v. Philadelphia* is without application or analogy and fails to support a compromised Fifth Amendment right against self-incrimination 26

III. The Impact of the Seventh Circuit's Holding in this Case Will be Substantial 27

CONCLUSION 30

APPENDICES:

Chan v. Wodnicki, No. 96-1683, 96-1784
1997 WL 532765 (CA 7 Aug. 29, 1997)
(to be published at 123 F.3d 1005) . . . . . Appendix A

Chan v. City of Chicago,
916 F. Supp. 804 (N.D. Ill. 1996) . . . . . Appendix B

Chan v. Wodnicki,
67 F.3d 137 (CA 7 1995) . . . . . Appendix C

Chan v. City of Chicago, No. 91-C-4671,
order (N.D. Ill. July 23, 1995) . . . . . Appendix D

Chan v. City of Chicago,
No. 91 C 4671, 1995 WL 431238
(N.D. Ill. July 19, 1995) . . . . . Appendix E

Chan v. City of Chicago,
777 F. Supp. 1437 (N.D. Ill. 1991) . . . . . Appendix F

Chan v. City of Chicago, No. 91-C-4671,
order (CA 7 Sept. 29, 1997) . . . . . Appendix G

TABLE OF AUTHORITIES

Cases PAGE

Anderson v. Creighton,
483 U.S. 635 (1987) 21, 22, 23

Bank of Nova Scotia v. United States,
487 U.S. 250 (1988) 25

Baxter v. Palmigiano,
425 U.S. 308 (1976) 17, 24, 25

Chan v. Wodnicki, Nos. 96-1683, 96-1784
1997 WL 532765 (CA 7 Aug. 29, 1997)
(to be published at 123 F.3d 1005)
(Appendix A) . . . . . *passim*

Chan v. Wodnicki,
67 F.3d 137 (CA 7 1995) (Appendix C) 6

Chan v. City of Chicago,
916 F. Supp. 804 (N.D. Ill. 1996) (Appendix B) 15, 16

Chan v. City of Chicago, No. 91-C-4671,
order (N.D. Ill. July 23, 1995) (unpublished)
(Appendix D) 6, 18

Chan v. City of Chicago,
No. 91 C 4671, 1995 WL 431238
(N.D. Ill. July 19, 1995) (Appendix E) 5, 6, 18

Chan v. City of Chicago,
777 F. Supp. 1437 (N.D. Ill. 1991)
(Appendix F) 4, 5, 18

Confederation of Police v. Conlisk,
489 F.2d 891 (CA 7 1973), *cert. denied sub nom. Rochford v. Confederation of Police*,
416 U.S. 956 (1974) 12, 19, 22, 27, 28

Daniels v. Pipefitters' Ass'n,
983 F.2d 800 (CA 7 1993) 17, 24, 25

Eberhardt v. O'Malley,
17 F.3d 1023 (CA 7 1994) 23

Elliott v. Thomas,
937 F.2d 338 (CA 7 1991),
cert. denied, 502 U.S. 1121 (1992) 27

Fraternal Order of Police, Lodge No. 5
v. City of Philadelphia,
859 F.2d 276 (CA 3 1988) 17, 21, 23, 27, 28, 30

Gardner v. Broderick,
392 U.S. 273 (1968) . . . . . *passim*

Garrity v. New Jersey,
385 U.S. 493 (1967) . . . . . *passim*

Griffin v. California,
380 U.S. 609 (1965) 25

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 21, 23, 29

K.H. Through Murphy v. Morgan,
914 F.2d 846 (CA 7 1990) 22, 23

LaSalle Bank Lake View v. Seguban,
54 F.3d 387 (CA 7 1995) 16, 17, 24, 25

Lefkowitz v. Cunningham,
431 U.S. 801 (1977) . . . . . *passim*

Lefkowitz v. Turley,
414 U.S. 70 (1972) 20, 23, 30

McGill v. Board of Education,
602 F.2d 774 (CA 7 1979) 5

Minnesota v. Murphy,
465 U.S. 420 (1984) 17, 24

Mitchell v. Forsyth,
472 U.S. 511 (1985) 21

Spevack v. Klein,
385 U.S. 511 (1967) 18, 19, 23, 30

Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation, 392 U.S. 280 (1968) 19, 20, 23, 30

United States v. Lanier,
117 S. Ct. 1219 (1997) 22, 23

United States v. Lanier,
73 F. 3d 1380 (CA 6 1996) 22, 23

Statutes

United States Code

18 U.S.C. § 242 22

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 4

28 U.S.C. § 1343(3) 4

28 U.S.C. § 1343(4) 4

42 U.S.C. § 1983 ..... *passim*

Constitution

United States Constitution

Amendment V ..... *passim*

Articles

Norman Lamm, *The 5th Amendment and Its Equivalent in Jewish Law*,
17 Decalogue J. 1 (Jan.-Feb. 1967) 25

PETITION FOR WRIT OF CERTIORARI

Cory D. Chan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, Appendix A, will be reported at 124 F.3d 1005. The district court's memorandum opinion and order entering judgment notwithstanding the verdict, Appendix B, is reported at 916 F. Supp. 804.

An earlier opinion of the court of appeals dismissing the defendant's interlocutory appeal, Appendix C, is reported at 67 F.3d 137. The district court's memorandum and opinion order denying the defendant's motion for summary judgment, Appendix E, is unreported as is the court's order certifying the appeal from that denial as frivolous, Appendix D. The order of the district court denying the defendant's motion to dismiss, Appendix F, is reported at 777 F. Supp. 1437.

JURISDICTION

The court of appeals entered judgment on August 29, 1997. App. A1. The court denied Officer Chan's petition for rehearing and suggestion for rehearing en banc on September 29, 1997. App. G1-G2. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

U.S. CONST. amend. V.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any

> citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994).

STATEMENT OF THE CASE

This action arose on August 9, 1989, when Cory Chan, a sixteen-year veteran of the Chicago Police Department (CPD), Tr. 292, and member of the Intelligence Section's Chicago Terrorist Task Force (CTTF),[1] responded to a subpoena to appear before a federal grand jury, Pl. Ex. 2 (SA120[2]). On advice of counsel, he invoked the Fifth Amendment. Tr. 154, 320.

After returning from the grand jury, Officer Chan met with Ronald Moran, then the commander of the Intelligence Section.[3] Tr. 339, 343, 690. The next day, he learned that, effective August 11, 1989, he had been removed from the CTTF. Tr. 345-46; Pl. Ex. 6 (SA126). On August 14, he learned that he would be detailed from the Intelligence Section, in the Bureau of Investigative Services, to the Ninth District, in the Bureau of Operational Services, *see supra* note 3, effective August 17. Tr. 346-47; Pl. Ex. 7 (SA127). Officer

---

[1] Established in February 1984, Tr. 453, the CTTF is composed of officers from the CPD and the Illinois State Police and agents from the Federal Bureau of Investigation, Tr. 304. Top Secret Security Clearance from the FBI is required to work on the CTTF.

[2] "SA" refers to the Separate Appendix filed below.

[3] The CPD's organizational structure in 1989 was a hierarchy with the superintendent at the top followed by deputy superintendents, each of whom headed one of five bureaus. Tr. 166. Under the deputy superintendents were, in order of decreasing rank, chiefs of divisions, commanders of sections, and lieutenants, sergeants, and patrol officers. Tr. 166. The Intelligence Section was part of the Organized Crime Division which, in turn, was part of the Bureau of Investigative Services. Tr. 166-67. The Bureau of Operational Services commanded the patrol districts. Tr. 166-67.

Chan was reassigned to the Ninth District on September 8, 1989. Tr. 228-30, 351. There he worked as a uniformed patrol officer on the afternoon and midnight shifts. Tr. 362.

Officer Chan's Pre-August 9, 1989 Status

Cory Chan began working for the CPD in 1973. Tr. 292. He did plainclothes work in the Intelligence Section for three years, in the Vice Control Section of Organized Crime, and again in the Intelligence Section. Tr. 293-95. In 1979, he was transferred to the Patrol Division as a plainclothes tactical officer. Tr. 295-98. In late 1983 or early 1984, Officer Chan applied to re-enter the Intelligence Section. Tr. 299. He was accepted and worked in the research unit and then in the organized crime surveillance group before being recruited for the CTTF. Tr. 299-303; *see supra* note 1. He served on the CTTF from March 1985 until August 9, 1989. Tr. 304.

While on the CTTF, Officer Chan was involved in the investigation, surveillance, and prosecution of terrorist groups and street gang members. Tr. 304-05. He was required to be available twenty-four hours a day and was given a car. Tr. 305-06. Based on annual agreements between the CPD and the FBI, CPD members of the CTTF were paid overtime in amounts similar to the Administratively Uncontrollable Overtime ("AUO") paid to FBI agents. Tr. 305-07, 365; Pl. Ex. 10-A-10-E (SA130-44).

Each year he was on the CTTF, Officer Chan received the maximum amount of AUO. Tr. 309. In addition, the City compensated him for additional CTTF overtime which exceeded the maximum AUO reimbursement amount. Tr. 309-10. As a member of the Intelligence Section, Officer Chan served on dignitary protection detail. He was compensated for that overtime as well. Tr. 181-82, 310.

The Defendant, Edward S. Wodnicki

On August 9, 1989, the defendant, Edward Wodnicki, was Deputy Superintendent for the Bureau of Investigative Services, *see supra* note 3. Tr. 518. He had been appointed to the position on July 23,

1989. Tr. 520. The defendant had been in the CPD since 1958 and had held numerous command positions. Tr. 520-22.

The Grievance Proceeding

On August 16, 1989, a grievance proceeding was filed on Officer Chan's behalf by the Fraternal Order of Police (FOP). *See Chan v. City of Chicago*, 777 F. Supp. 1437, 1440 (N.D. Ill. 1991) (App. F, F3-F4). On August 20, 1990, an arbitrator ordered Officer Chan reinstated to the Intelligence Section and payment of the benefits that he had lost. *Id.* (F4). The arbitrator ruled that he was without jurisdiction to order reinstatement to the CTTF. *Id.*

The Lawsuit and the District Court's Jurisdiction

Officer Chan filed this action against the defendant, the City of Chicago, the CPD, and three other police officers,[4] in the United States District Court for the Northern District of Illinois, Eastern Division, on July 24, 1991. Complaint, p. 1 (SA26). The individual defendants were sued individually and in their official capacities. *Id.*

In count I of his complaint, Officer Chan alleged that the defendants had improperly removed him, transferred him, and effectively demoted him in retaliation for asserting his Fifth Amendment privilege before a federal grand jury. *Id.* at 11-17 (SA36-42). The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331, 1343(3), 1343(4); 42 U.S.C. § 1983; and the Fifth and Fourteenth amendments to the United States Constitution.

---

[4] Reflecting the CPD's hierarchy, *see supra* note 3, the complaint named as defendants the lieutenant in the Intelligence Section in charge of the CTTF (John Guarnieri); the commander of the Intelligence Section (Ronald Moran); the chief of the Organized Crime Division (Elgia Cook); the deputy superintendent of the Bureau of Investigative Services (Edward S. Wodnicki); and the superintendent of the CPD (LeRoy Martin). Complaint, p. 1 (SA26).

The Defendants' Motion to Dismiss

The defendants filed a motion to dismiss on September 27, 1991. R. 7. On December 10, 1991, the district court found that count I adequately pleaded a constitutional violation by alleging "a demotion or constructive demotion: transfer to a less desirable position with loss of overtime pay and car-use benefits." 777 F. Supp. at 1442 (App. F10).

In denying the motion to dismiss count I, the court followed *Gardner v. Broderick*, 392 U.S. 273, 278-79 (1968), and *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977). 777 F. Supp. at 1442 (App. F9). It further found that the defendants, sued individually, were not entitled to qualified immunity because a police officer's right to invoke the Fifth Amendment "was sufficiently particularized by August 1989, the time of Chan's transfer, to hold the individual defendants liable if they are to have found to have violated that right." *Id.* at 1443 (F11). The court also held: "Retaliatory transfers were held to violate the First Amendment in *McGill v. Board of Educ.*, 602 F.2d 774, 780 (7th Cir. 1979). . . . A reasonable person should have known at least by *McGill* that a police officer could not be transferred for asserting his Fifth Amendment rights." 777 F. Supp. at 1443 (App. F11).

The district court dismissed the remaining counts and claims against the City and against the individual defendants in their official capacity. 777 F. Supp. at 1441-42, 1442-43, 1443-44 (App. F7-F8, F10, F12-F13).

The Motion for Summary Judgment

The court entered summary judgment for defendants Martin, Cook, Moran, and Guarnieri, *see supra* note 4, on July 18, 1995. *Chan v. City of Chicago*, No. 91 C 4671, 1995 WL 431238, at *1-2 (N.D. Ill. July 19, 1995) (App. E3-E6).

Exhibits and the deposition testimony of Commander Moran suggested that Officer Chan was removed from the CTTF before his top secret security clearance was revoked and countered the defendant's contention that he had transferred Officer Chan because his

security clearance had been revoked by the FBI. *Id.* at *2 (App. E6-E7). Denying the defendant's motion for summary judgment, the court also rejected his qualified immunity defense:

> An official cannot prevail in his qualified immunity defense if "the legal norms governing [his] behavior were clearly established at the time of the challenged actions." . . .
>
> Since 1977, it has been well established that a police officer may not be given "substantial penalties" in return for exercising his Fifth Amendment right to not provide incriminating testimony against himself. . . .

1995 WL 431238 at *3 (App. E7); *see id.* n.3 (E7-E8) (citing *Lefkowitz v. Cunningham,* 431 U.S. at 805) (citation omitted).

Certification of Frivolous Appeal

On July 20, 1995, the defendant appealed the finding of no qualified immunity. R.162.[5] The following day, the district court filed a certification that the appeal was frivolous:

> [T]he law was clearly established in 1989 that a government official such as [defendant] could not substantially penalize an employee such as Mr. Chan for asserting his Fifth Amendment privilege before a grand jury.

Chan v. City of Chicago, No. 91-C-4671, order, at 3-4 (July 23, 1995) (App. D, D3-D4) (unpublished).

The Testimony and Evidence at Trial

This case was tried from July 24 through July 27, 1995.

---

[5] The United States Court of Appeals denied the defendant's motion to stay the trial proceedings and, on September 29, 1995, dismissed the appeal as moot. *Chan v. Wodnicki,* 67 F.3d 137, 140 (CA 7 1995) (App. C, C5-C6). At the same time the court held that the issue of qualified immunity survived the trial. *Id.*

The Grand Jury Appearance

Officer Chan testified that, on July 19, 1989, when he had learned that he had been subpoenaed to appear before a federal grand jury, Sergeant Terry Hillard, his immediate supervisor on the CTTF, Tr. 634, 640, and Elgia Cook, Chief of the Organized Crime Division, *see supra* note 4, directed him to prepare a "to/from report" informing Superintendent LeRoy Martin, *see supra* note 4, that he had received a federal grand jury subpoena, Tr. 316-17.

In the July 19, 1989 report that he prepared, Officer Chan forwarded information relating to the grand jury appearance and reported that, on July 19, 1989, he had been

> contacted by Sgt. T. Hillard, #1798, via telephone and was instructed to report to the Office of the Chief, OCD [Organized Crime Division]. At 1600 hours, R/O [Reporting Officer Chan] met with Chief Cook, who informed R/O that a federal subpoena had been issued for the undersigned and was delivered to the Office of the Superintendent. R/O was handed the subpoena and was informed to make the necessary reports. R/O was informed this was relative to a Federal investigation of the gambling activities in the Chinatown area.

Plf. Ex. 11 (SA145). The "to/from report" passed through the chain of command, *see supra* note 4, until it reached the superintendent's office. Tr. 318-19.

After he had received the subpoena, Officer Chan contacted the FOP and was put in touch with Joseph Roddy, the FOP's attorney, who, he was told, would assist him in the grand jury appearance. Tr. 319-20. Joseph Roddy told him that he would contact the U.S. Attorney's Office to find out why he was being called. Tr. 320.

Mr. Roddy testified that he had been unable to determine from the U.S. Attorney's Office whether Officer Chan was being subpoenaed as a target, a subject, or a witness. Tr. 154. As a result, he advised Officer Chan to take the Fifth Amendment at the grand jury proceedings. Tr. 154, 320. On July 27, 1989, he wrote to Assistant U.S. Attorney John Scully asking whether Officer Chan's presence at the grand jury was required or "if a letter indicating . . . that he would take the Fifth Amendment would suffice." Plf. Ex. 3 (SA121), Tr. 161-62.

Sergeant Hillard testified that, prior to Officer Chan's grand jury appearance, William Dyson, an FBI agent and, in 1989, the overall supervisor of the CTTF, *see* Tr. 597-98, showed him a copy of the letter to John Scully stating that Officer Chan would assert his Fifth Amendment privilege before the grand jury, SA121. Tr. 629, 645; *see also* Tr. 693 (Commander Moran was also aware of the letter).

Early on August 9, 1989 Sergeant Hillard told Officer Chan to telephone him when he finished his grand jury testimony. Tr. 669.

At 1:30 p.m. on August 9, 1989, Officer Chan appeared alone before the grand jury. Tr. 156, 321. At trial, he was asked whether the Assistant U.S. Attorney "at any time pose[d] questions to [him] which were narrowly or specifically related to [his] official duties as a police officer" and whether he was advised "the answers that [he] would be giving to the grand jury . . . would not be used against [him] in any criminal context." Tr. 336. Officer Chan answered "No" to both questions. Tr. 336.[6] He confirmed that he had told the Assistant U.S. Attorney that, on advice of counsel, he intended to assert his Fifth Amendment privilege. Tr. 336.

Officer Chan testified that after he had asserted his Fifth Amendment privilege before the grand jury, the U.S. Attorney told him that he was not a subject or target of an investigation, although he might be recalled as a witness. Tr. 336-37.

Events After the Grand Jury Appearance

Officer Chan testified that, as instructed, he telephoned Sergeant Hillard after his grand jury appearance, Tr. 669, and reported that he had taken the Fifth Amendment, Tr. 337, 671. Sergeant Hillard had told Officer Chan to meet him at the Intelligence Section office.

---

[6] The defendant is represented by corporation counsel for the City of Chicago. At trial, corporation counsel presented and prevailed on a motion in limine to bar Officer Chan's attorney from asking him what questions he had been asked when he appeared in front of the grand jury. Tr. 321. As a result, Officer Chan's attorney was permitted to ask him two leading questions to elicit that he had not been asked about his official duties or given immunity. Tr. 336-37.

Tr. 338, 671. Sergeant Hillard testified that, following the call, he went to the Intelligence Section office and spoke with John Guarnieri, then a CPD lieutenant assigned to the Intelligence Section, Tr. 716, *see supra* note 4, who, in turn, spoke with Commander Moran. Tr. 673. Edward Downes, now an attorney in private practice, but then a CPD sergeant in Intelligence, Tr. 165, was also there. Tr. 674.

According to Officer Chan, when he arrived at the office, he first talked to Lieutenant Guarnieri and told him he had taken the Fifth Amendment. Tr. 338-39. Lieutenant Guarnieri then told him to go into Commander Moran's office and repeat what he had said about taking the Fifth Amendment. Tr. 339. Officer Chan did this. Tr. 343.

Once Officer Chan had reported to Commander Moran, Commander Moran asked him to leave his office. Tr. 343. As he was leaving, Commander Moran picked up the telephone. Tr. 343. According to Officer Chan, "Lieutenant Guarnieri came out and told me that I may lose my security clearance, and I may get transferred out of the intelligence section. I replied that you couldn't do that." Tr. 343. Lieutenant Guarnieri did not respond and went back into Commander Moran's office. Tr. 343.

According to former Sergeant Downes, Commander Moran was on the phone speaking to someone who outranked him. Tr. 217, 218. When Commander Moran hung up the phone, he said, "['T]he deputy[']"—i.e., Edward Wodnicki—"[']is livid.[']" Former Sergeant Downes asked, "[']Why is he livid?[']" The answer was, "[']Cory Chan took the Fifth.[']" Commander Moran directed Lieutenant Guarnieri and Former Sergeant Downes "['to] get him in here and have him leave a report.[']" Tr. 219.

When called by the defendant at trial, Commander Moran testified that, on the day of the grand jury appearance, the only contact that he had with Officer Chan was in his office: "[H]e spoke and I listened." Tr. 690. Commander Moran could not recall having called the defendant on that day, *see* Tr. 690, 692, 694-95, or having said that the defendant was livid, Tr. 690.

Called by Officer Chan, the defendant testified that he did not remember having a conversation in which Commander Moran

advised him that Officer Chan had asserted his Fifth Amendment privilege during his grand jury appearance. Tr. 531. He was impeached with his deposition testimony, in which he had stated that he had learned of Officer Chan's taking the Fifth Amendment in conversations with several individuals in his command level. Tr. 532. Asked at his deposition whom he had talked to first, he replied, "I would probably say Commander Moran, Ronny Moran." Tr. 532.

After meeting with Lieutenant Guarnieri and Commander Moran, Officer Chan prepared another "to/from report" summarizing his grand jury appearance and those meetings. Tr. 344-45, Pl. Ex. 13 (SA146). He reported that he was not a target of the investigation which was unrelated to his work on the CTTF. Pl. Ex. 13 (SA146).

The Reason for Officer Chan's Removal, Transfer, and Effective Demotion

The defendant testified that he learned that Officer Chan had asserted his Fifth Amendment privilege "late" on August 9, 1989. Tr. 579. He confirmed that it was he who had made the decision to remove Officer Chan from the Intelligence Section and from the CTTF because he had asserted his Fifth Amendment privilege. Tr. 527, 537. He gave four reasons.

The first reason was that he did not know why Officer Chan had asserted the Fifth Amendment privilege, Tr. 584, and could not find out the basis of the investigation, Tr. 590.[7] The second reason was because the defendant considered Officer Chan a risk as far as confidential information was concerned. Tr. 584, 595.[8] The third

---

[7] When asked if he had ever approached Officer Chan to find out about his appearance before the grand jury, the defendant responded: "At the time I didn't even know the gentleman. And I was following a chain of command. No, I did not." Tr. 591.

[8] He was asked: "[I]s it your view that because [Officer Chan] asserted his Fifth Amendment, he's untrustworthy?" Tr. 595. The defendant answered. "No." Tr. 595.

reason was because the FBI said they were going to remove Officer Chan's security clearance. Tr. 584-85. The fourth reason was because the FBI did not want Officer Chan. Tr. 595-96.[9]

Agent Dyson testified that on August 9, 1989, he learned from another FBI agent on the CTTF and Sergeant Hillard that Officer Chan had taken the Fifth Amendment before the grand jury. Tr. 603, 612-14. Within an hour, Agent Dyson received a call from Commander Moran who said he was going to remove Officer Chan from the CTTF immediately. Tr. 598-99. Agent Dyson told Commander Moran that if the CPD chose to remove Officer Chan, they had a right to do so. Tr. 599. Commander Moran responded, "[W]ell, as far as I'm concerned, he's removed from the task force." Tr. 599.

Agent Dyson was asked whether, between the time of Officer Chan's grand jury appearance and the call from Commander Moran, he "had a conversation with Edward Wodnicki in which you advised him that Cory Chan's security clearance would be revoked." Tr. 599. Agent Dyson answered: "No, I did not." Nor, during that time period, did he have a conversation with the defendant in which he said "the task force didn't want Cory Chan any more, take him off, or words to that effect." Tr. 600, *see supra* note 9.

Agent Dyson testified that, after the call from Commander Moran, he learned that a security clearance is issued for specific purposes, and when the purpose is no longer there—as when Officer Chan was removed from the CTTF—the clearance no longer exists. Tr. 618. According to Agent Dyson, the defendant called him sometime later on August 9 or the next morning, and he informed the defendant that Officer Chan's security clearance was no longer in force. Tr. 600-01.

---

[9] The defendant testified that, on August 9, 1989, he had spoken to Bill Dyson, *see supra* p. 8, who said: "[']I don't know [what's going on with Cory Chan]. We can't keep him here. He went to the grand jury. He took the Fifth. You have got to get him the hell out of here.[']" Tr. 582.

The CPD and the Fifth Amendment in 1989

Joseph Roddy testified that in 1989 CPD Rule 51 did not permit an officer to be penalized for asserting the Fifth Amendment privilege. Tr. 155, 159. Reflecting the holding in *Garrity v. New Jersey*, 385 U.S. 493 (1967), Rule 51 provided that the only time a police officer does not have the right to assert his Fifth Amendment privilege is if the questions asked are narrowly, directly, and specifically related to the officer's duties. Tr. 155. Former Sergeant Downes explained that Rule 51 once prohibited police officers from refusing to testify before a body investigating a criminal matter but was changed in the 1970s. Tr. 196-97.

The defendant confirmed that he knew that a police officer was entitled to assert the Fifth Amendment under certain circumstances and it was a violation of CPD rules and regulations to penalize someone for asserting that privilege. Tr. 528. He was also aware that the court of appeals had ruled in *Conlisk*[10] that it is not possible to penalize a police officer for invoking the Fifth Amendment right against self-incrimination. Tr. 679. He further acknowledged that the CPD rule was modified after *Conlisk* so that a police officer could assert the Fifth Amendment privilege without fear of penalty. Tr. 529, 530.

The Replacement on the CTTF

In August 1989, Ralph Schauf was a patrol officer in the Gang Crimes North Division. Tr. 621. The defendant and former Sergeant Downes confirmed that Schauf was detailed into the Intelligence Section on the same day that Officer Chan was detailed to the Ninth District. Tr. 523, 622-23; Pl. Ex. 7 (SA127). The defendant, who had been commander of the Gang Crimes Section, acknowledged that Schauf had been an officer under his command and that he had recommended that Schauf be interviewed for the position left vacant by Officer Chan's removal. Tr. 522-23.

---

[10] *Confederation of Police v. Conlisk*, 489 F.2d 891 (CA 7 1973), *cert. denied sub nom. Rochford v. Confederation of Police*, 416 U.S. 956 (1974).

Ralph Schauf testified that in August of 1989 he was called to the intelligence office to complete an application. Tr. 621-22. He was interviewed by Lieutenant Guarnieri and, a couple weeks later, was detailed into the intelligence unit. Tr. 622-23.

According to former Sergeant Downes, the normal transfer period was twenty-eight days. Tr. 227-28. There was always a large number of pending applications for the Intelligence Section which was considered "prestigious and elite" in the CPD. Tr. 186, 189, 231. In August 1989, there were around 100 qualified applicants who had applications on file. Tr. 186.

Officer Chan's Performance Record

Sergeant Hillard worked with Officer Chan on the CTTF from 1985 to 1989. Tr. 625. In his opinion, Officer Chan was a good policeman, willing to work overtime, and flexible. Tr. 626-27. He was never concerned that Officer Chan was a security risk, even after Officer Chan took the Fifth Amendment. Tr. 627-28. Thomas Raines, a CPD detective assigned to the CTTF for part of that time, stated that Officer Chan was a good worker with the skills required to perform CTTF duties well. Tr. 453-54.

Responsible for staffing the detail for dignitary protection in 1989, former Sergeant Downes selected Officer Chan because he had the requisite skills to perform dignitary protection to a greater degree than others, Tr. 178-81. He had worked in surveillance groups with Officer Chan and considered him competent and well suited for such work. Tr. 184.

William Callaghan was a commander of the CPD Intelligence Section and one of Officer Chan's supervisors at the time of trial. Tr. 703. He had observed no problem with Officer Chan's integrity, his personality, or his ability to get along with people. Tr. 707-08; *see* Tr. 709. He had assigned Officer Chan to sensitive investigations and to dignitary protection. Tr. 708.

"Dumping"

"Dumping" was defined, discussed, or referred to in opening statements, Tr. 133, 139, and closing arguments, Tr. 922, 949-51, 958, 960-61, and by witnesses, Tr. 402, 438, 442-43, 496, 694. Former Sergeant Downes testified that an involuntary transfer from one assignment to a less desirable position was called a "dump," Tr. 193—a term used by CPD officers for over twenty years, Tr. 192. Within the CPD, a "dump" carried a negative connotation with the implication that it was a demotion. Tr. 194. It was "something negative about you that caused you to lose favor." Tr. 195. An involuntary assignment from the Intelligence Section to a uniformed patrol division was a "dump." Tr. 194.

Officer Chan's Reputation

Officer Chan experienced what he described as a stigma following his transfer from the CTTF to the Uniformed Patrol Division. Tr. 401. There was consequent damage to his reputation in the law enforcement community, Tr. 395-96, 398-400, and cultural embarrassment in the Chinese community, Tr. 402-05.

Pamela Chan testified that, after the transfer, her husband became withdrawn, sad, humiliated, and embarrassed, and did not go out of the house to be with friends and neighbors as he had before the transfer. Tr. 490-92. They were no longer invited to social functions in Chinatown. Tr. 493. Neighbors wondered what happened and asked why her husband no longer had a car and was wearing a uniform. Tr. 495-96, 498.

Economic Consequences

At trial, the Chans described the economic consequences of the transfers. Tr. 494 (Mrs. Chan); Tr. 405, 362-66, 684 (Officer Chan). Witnesses, including Officer Chan, presented evidence of what CPD officers had made and/or were making as members of the CTTF. *See* Tr. 376-77, 385-90, Plf. Ex. 22-A, 22-B, 22-C, 22-D (Officer Chan); Tr. 465, 471-75, 478-79, Plf. Ex. 23 (Thomas Raines); Tr.

181-82 (Former Sergeant Downes); Tr. 862-70 (Gary Clark, manager of the CPD payroll since 1989).

Reinstatement Prospects

In August 1990, Officer Chan was reassigned to the Intelligence Section. Tr. 439. In April of 1991, he was renominated to the CTTF and filled out an application for a top secret security clearance. Tr. 441. At trial, Agent Dyson had "no idea" whether the application had been acted upon. Tr. 619-20.

Thomas Raines testified that after Ralph Schauf joined the CTTF to replace Officer Chan, two members were admitted, one in April 1990, and one in June or July in 1991. Tr. 461, 462. Since a death in 1993, there have been only eleven CTTF members, and he was unaware of any replacement in the near future. Tr. 463-65. The CTTF is a prestigious assignment. Tr. 475-76.

The Verdict

The jury returned a verdict for Officer Chan, awarding $21,000 (net) for lost earnings and benefits, $10,000 for pain and suffering, and mental anguish, and $121,000 in punitive damages. Judgment was entered on August 1, 1995. The parties filed post-trial motions.

Judgment Notwithstanding the Verdict

On February 20, 1996, the court ruled the defendant to be qualifiedly immune and granted judgment notwithstanding the verdict:

> Mr. Chan's transfer—a sanction which the jury found cost him $21,000—does not rise to the level of penalties which have been labeled "substantial" because it is not comparable to the penalties which the Supreme Court has found impose an unconstitutional cost on the exercise of the Fifth Amendment privilege.[2]
>
> . . . . Mr. Chan was not required to relinquish his livelihood . . . . [he] lost only 7.6 percent of his income. A loss of 7.6

> percent of one's income is not the type of injury that either the Supreme Court or the Seventh Circuit has in the past found to be substantial. *See LaSalle Bank Lake View v. Seguban,* [54 F.3d 387, 389 (CA 7 1995)].

Chan v. City of Chicago, 916 F. Supp. 804, 807 (App. B6-B8). In footnote 2, the court held: "[T]he cases do not support a claim that [the defendant] should have known that $21,000 was a substantial penalty." *Id.* n.2 (B7 n.2). The court continued:

> [A]t the time of Mr. Chan's transfer in 1989, the law was not clearly established that the type of injury inflicted upon him violated his rights under the Fifth Amendment; therefore, [the defendant] is qualifiedly immune from liability.

Id. at 808 (B9).

The Opinion of the Court of Appeals

In an opinion filed on August 29, 1997, the United States Court of Appeals for the Seventh Circuit affirmed the district court's entry of judgment notwithstanding the verdict on grounds of qualified immunity. *Chan v. Wodnicki,* Nos. 96-1683, 96-1784, 1997 WL 532765, *5 (CA 7 Aug. 29, 1997) (to be published at 123 F.3d 1005) (App. A10). While rejecting the district court's purely dollars and cents analysis, *id.* at *3 n.4. (App. A7 n.4),[11] the Court held that it was not clearly established in 1989 that a police officer's retaliatory transfer for exercising the Fifth Amendment privilege in a grand jury proceeding unrelated to his professional duties is "the sort of deprivation that the case law said was forbidden." *Id.* at *4 (App. A9).

To reach its holding, the court quoted *Lefkowitz v. Cunningham,* 431 U.S. 801, 806, for the proposition that "the effect [of invoking the Fifth Amendment] must be sufficiently severe to be 'capable of forcing the self-incrimination which the Amendment forbids,' " 1997

---

[11] The court states: "To the extent the district court's opinion can be read as holding that the Fifth Amendment is violated only by economic burdens, it does not state fully the law." *Id.*

WL 532765, *4 (App. A8). Citing *Cunningham* and cases holding that adverse inferences can be drawn from invocation of the Fifth Amendment in civil proceedings, 1997 WL 532765, *4 (App. A8-A9),[12] the court suggests that "the jurisprudence of the Supreme Court and of this court also makes clear that not every consequence of invoking the Fifth Amendment is considered sufficiently severe to amount to coercion to waive the right," *id.* (App. A8).

The court of appeals rested its holding on *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 859 F.2d 276 (CA 3 1988), a case, as described by the court, decided "shortly before [the defendant] acted," in which the Third Circuit "held that the lateral transfer of a police officer did not amount to the sort of penalty that could be considered coercive with respect to Fifth Amendment rights." 1997 WL 532765, *4 (App. A9). Observing that the Third Circuit had "noted specifically that it could find no case that had held that any action short of discharge or suspension constituted such a threat," *id.* (*citing* 859 F.2d at 283 n.10), the court concluded: "Officer Chan, who has the burden on this issue, also has not been able to find such authority," *id.*

REASONS FOR GRANTING THE WRIT

This is a case where, after four days of hearing the testimony of many witnesses, a jury concluded that the retaliatory transfer of Officer Chan from the CTTF to the Patrol Division was a substantial penalty exacted on Officer Chan's exercise of his constitutional right against self-incrimination. It is a case where the jury not only awarded damages of $21,000 for economic loss and $10,000 for pain and suffering but, in addition, assessed $121,000 in punitive damages against a defendant who—with full awareness that it was against the rules of the CPD to penalize an officer for invoking the Fifth Amendment's right against self-incrimination before a grand

---

[12] The court cited *Minnesota v. Murphy*, 465 U.S. 420 (1984); *Baxter v. Palmigiano*, 425 U.S. 308 (1976); *LaSalle Bank Lake View v. Seguban*, 54 F.3d 387, *supra*; *Daniels v. Pipefitters' Ass'n*, 983 F.2d 800 (CA 7 1993).

jury—immediately ordered the retaliatory transfer without inquiry or investigation.

I. The Writ Should Be Granted Because the Seventh Circuit's Holdings Directly Conflict with Decisions of This Court

This Court's review is required, and the writ should be granted, because the Seventh Circuit's holding that the law was not clearly established in 1989 and its implicit corollary holding that such law can only be established by factually indistinguishable precedent are in direct conflict with decisions of this Court.

A. The decisions of this Court had clearly established by 1989 that the substantial penalty found by the jury in this case violated Officer Chan's Fifth Amendment right against self-incrimination.

First in 1991 and again in 1995, two district court judges, one the trial judge in this case, denied defense motions based on qualified immunity holding that controlling law in 1989 prohibited the retaliatory transfer of a police officer for invoking the Fifth Amendment before a federal grand jury without an assurance of immunity in an investigation unrelated to the police officer's professional responsibilities. *Chan v. City of Chicago* 777 F. Supp. at 1442-43 (App. F11), *see supra* p. 5; *Chan v. City of Chicago*, 1995 WL 431238, at *3 (App. E7-E9), *see supra* p. 6; *see also Chan*, order at 2 (App. D2), *see supra* p. 6. Both judges held that the law in 1989 was sufficiently particularized to deny the defendant qualified immunity. Neither erred in reaching that holding.

In 1967, this Court in *Garrity v. New Jersey*, 385 U.S. 493 (1966), struck down a state forfeiture-of-position statute that had forced police officers, under threats of losing their jobs, to give unimmunized testimony before a board investigating ticket fixing. The Court held that the coerced statements could not be used in subsequent criminal proceedings. "We conclude," the Court emphasized, "that policemen, like teachers and lawyers, are not [illegible]ated to a watered-down version of constitutional rights." *Id.* at 500. At

the same time, the Court extended the privilege to lawyers in *Spevack v. Klein*, 385 U.S. 511 (1967), holding that the protection of the Fifth Amendment "should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it." *Id.* at 514.

Having extended the protection of the Fifth Amendment to individual public employees in 1967, the Court refined the scope of that protection in 1968. In *Gardner v. Broderick*, 392 U.S. 273 (1968), and *Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation*, 392 U.S. 280 (1968), the Court struck down a section of the New York City Charter that required public employees called to testify to sign waivers of immunity or lose their jobs. In *Gardner*, a policeman had been called before a grand jury and told he would be asked about the performance of his official duties. He refused to sign the waiver and lost his job. The Court held that, although the police officer could not be fired for refusing to waive immunity, he could have been dismissed if he had been assured immunity and refused to answer questions "specifically, directly, and narrowly relating to the performance of his official duties." 292 U.S. at 278.

In 1973, the Seventh Circuit applied the Fifth Amendment protection developed in *Garrity* and *Gardner*. In *Confederation of Police v. Conlisk*, 489 F.2d 891 (CA 7 1973), *cert. denied sub nom. Rochford v. Confederation of Police*, 416 U.S. 956 (1974), *supra* note 10, officers were suspended or discharged for invoking the Fifth Amendment before a grand jury after being told that anything that they said could be used against them. Following the Supreme Court in *Gardner* and *Uniformed Sanitation Men*, the court struck down CPD Rule 51 and related rules which, like the section of the New York City Charter, had required police officers to waive immunity or be fired. *Id.* at 895.

The Seventh Circuit omitted *Conlisk* from its analysis of Fifth Amendment cases. *See Chan*, 1997 WL 532765, *3-4 (App. A7-A8). It did, however, discuss *Lefkowitz v. Cunningham*, 431 U.S. 801, the case in which the Court found unconstitutional a New York statute that required an official of a political party either to testify or to waive immunity when called by a grand jury to testify about his conduct in office. If he did neither, the statute required termina-

tion and stipulated that he could not hold such an office for five years.

Omitted from the court's discussion of and quotation from *Cunningham* is this Court's direct repudiation of any construction of its prior decisions—i.e., *Garrity, Spevack, Gardner, Uniformed Sanitation Men*[13]—as requiring direct economic sanction for there to be unconstitutional compulsion to give up the protection of the Fifth Amendment privilege against self-incrimination. In the context of acknowledging that "our earlier cases were concerned with penalties having a substantial economic impact," the Court stressed:

> [T]he touchstone of the Fifth Amendment is *compulsion*, and direct economic sanctions and imprisonment *are not* the only penalties capable of forcing the self-incrimination which the Amendment forbids.

431 U.S. at 806 (emphasis added).

In *Cunningham*, the Court pointed to the party official's party offices as "carry[ing] substantial prestige and political influence," the threatened loss of which "[was] inherently coercive" and "diminish[ed] [his] general reputation in his community." *Id.* at 807. Applied to the facts of this case, the question posed by *Garrity* and its progeny in 1989 was:

> *If* Officer Chan had been told *before* his grand jury appearance that the new deputy superintendent would immediately remove him from the CTTF and transfer him from the Intelligence Section if he invoked the Fifth Amendment when he appeared before the grand jury, would Officer Chan have felt compelled to testify, to waive immunity, and to surrender his constitutionally protected right against self-incrimination?

Given Officer Chan's love of his job and the real and devastating personal and professional loss engendered by his removal from the CTTF, the answer to the question is "Yes." That answer unequivo-

---

[13] In *Lefkowitz v. Turley*, 414 U.S. 70 (1973), the Court had also extended the protection of the Fifth Amendment's privilege to architects with government contracts and invalidated a New York statute compelling testimony or waiver of immunity before a body investigating public contracts.

cally determines whether the defendant's retaliatory transfer of Officer Chan in 1989 was an unconstitutional infringement of a well-established and defined protected right. It was.

B. This Court has consistently rejected a requirement that only prior case law that is factually indistinguishable clearly establishes the constitutional rights of which a reasonable person would have known.

Implicit in the Seventh Circuit's holding that the law was not clearly established in 1989 and in its citation of the Third Circuit's footnote in *FOP v. Philadelphia* that it could find "no case that had held that any action short of discharge or suspension constituted a threat [coercive with respect to Fifth Amendment rights]," 1997 WL 532765, *4 (App. A9), *see supra* p. 17; *but see infra* pp. 26-27, is a holding that such authority is necessary to defeat a defense of qualified immunity. This implicit holding both conflicts with the decisions of this Court and fails to recognize the reason why there is here no factually indistinguishable precedent.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court defined the parameters of the defense of qualified immunity. Abandoning a subjective, good faith element of the defense, the Court held the immunity extended to an official's conduct that "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. While an official who claims "extraordinary circumstances" may be allowed to prove he did not know and could not have known of the relevant law, the defense "turn[s] primarily on objective factors." *Id.* at 819.

In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court clarified the standard:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see Mitchell[v. Forsyth], supra*, 472 U.S. [511,] 535, n.12 [(1985)], . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

483 U.S. at 640 (emphasis added).

In the context of rejecting a higher standard for the "fair warning" required for 18 U.S.C. § 242, this Court recently discussed the prior factual particularity required of the "clearly established" standard of 42 U.S.C. § 1983 and reiterated:

> [A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful" . . . .

United States v. Lanier, 117 S. Ct. 1219, 1227 (1997) (quoting *Anderson, supra*, at 640).

The constitutional rule that police officers cannot be penalized for exercising their Fifth Amendment right against self-incrimination before federal grand juries without immunity in matters not relating to their professional duties could not have been more clearly identified in 1989. There is no factually indistinguishable precedent for three reasons.

The first reason is because the law was well-established and well-defined from its extension to policemen in *Garrity* in 1966 through its refinement in *Gardner* and *Cunningham* in 1968 and 1976 and its application by the Seventh Circuit in *Conlisk* in 1973.

The second reason is because, following this Court's decisions in *Garrity* and *Gardner*, and the Seventh Circuit's decision in *Conlisk*, states, cities, and police departments changed their statutes, charters, and regulations to conform to those decisions. Certainly by 1976, states, cities, and police departments knew—as the defendant in this case knew, *see supra* p. 12—that they cannot penalize a public employee whose testimony is not immunized for invoking the Fifth Amendment privilege when called before a grand jury.

The third reason why there is no particularized case on point is because, as this Court observed in quoting the dissenting judge in *United States v. Lanier*, 73 F. 3d 1380 (CA 6 1996),

> "[t]he easiest cases don't even arise. There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or . . .] liability."

Id. at 1410 (quoting *K.H. Through Murphy v. Morgan*, 914 F.2d 846, 851 (CA 7 1990)) (quoted in *Lanier*, 117 S. Ct. at 1227). That this case arose at all is attributable solely to the defendant's gamble that he could shift the responsibility for what he had done onto the FBI—a gamble that he lost (or should have lost) when the jury chose to believe the testimony of William Dyson, *see supra* p. 11, and rejected his defense.

Contrary to the implicit holding of the Seventh Circuit in this case, the absence since 1973 of any Fifth Amendment case with facts analogous to those of this particular case defeats the defendant's claim of qualified immunity. To paraphrase what the Seventh Circuit said in the context of a First Amendment § 1983 action:

> This is such an elementary violation of the [Fifth Amendment right against self-incrimination] that the absence of a reported case with similar facts demonstrates nothing more than widespread compliance with well-recognized constitutional principles.

Eberhardt v. O'Malley, 17 F.3d 1023, 1028 (CA 7 1994).

The finding of the court of appeals in this case that governing law was not clearly established in 1989 and the court's holding of qualified immunity conflict directly with the decisions of this Court in *Garrity*, *Spevack*, *Gardner*, *Uniformed Sanitation Men*, *Turley*, *Cunningham*, *Harlow*, *Anderson*, and *Lanier*. This Court's review is required, and the writ should be granted.

II. The Seventh Circuit's Compromised Fifth Amendment Right Against Self-Incrimination Is Unsupported by the Law and Is Erroneous

The Court's review is also required, and the writ should be granted, because the court has redefined the Fifth Amendment right against self-incrimination in the criminal context. Neither its appeal to *Cunningham* and decisions sanctioning the use of adverse inferences from the invocation of the Fifth Amendment in civil proceedings nor the court's reliance on the Third Circuit's decision in *FOP v. Philadelphia*, *supra*, provides any support for that redefinition.

A. In the context of grand jury proceedings, civil adverse inference decisions fail to support a compromised Fifth Amendment right against self-incrimination.

In its opinion, the Seventh Circuit cites this Court's decisions in *Minnesota v. Murphy*, and *Baxter v. Palmigiano*, and its own decisions in *LaSalle Bank Lake View v. Seguban*, and *Daniels v. Pipefitters' Ass'n*, *see supra* note 12, for the statement that

> the jurisprudence of the Supreme Court and of this court also makes clear that not every consequence of invoking the Fifth Amendment is considered sufficiently severe to amount to coercion to waive the right.

Chan, 1997 WL 532765, *4 (App. A8). "Rather," the court continues, "the effect must be sufficiently severe to be 'capable of forcing the self-incrimination which the Amendment forbids.'" *Id.* (quoting *Cunningham*, 431 U.S. at 806). The court has misrepresented what this Court actually said in *Cunningham* and ignored three critical realities in citing *Murphy*, *Baxter*, *LaSalle Bank Lake View*, and *Daniels* in support of this particular statement of its jurisprudence.

In *Cunningham*, this Court did *not* state, as the Seventh Circuit has represented, that "the effect [of invoking the Fifth Amendment] must be sufficiently severe to be 'capable of forcing the self-incrimination which the Amendment forbids.'" 1997 WL 532765, *4 (App. A8). What the Court actually said is:

> [T]he touchstone of the Fifth Amendment is compulsion, and direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the Amendment forbids.

431 U.S. 806; *see supra* p. 20. Far from suggesting that the constitutional privilege against self-incrimination is a sometime, variable constitutional right in criminal and grand jury proceedings, viable only if threatened by direct economic sanctions or imprisonment, this Court in *Cunningham* was saying exactly the opposite.

The first critical reality ignored by the court of appeals are the contexts giving rise to the invocation of the Fifth Amendment in *Murphy*, *Baxter*, *LaSalle Bank Lake View*, and *Daniels*. Not one is

a criminal proceeding. Historically, the Fifth Amendment privilege against self-incrimination evolved as " 'a civilized protest against the use of torture in extorting confessions.' " *Garrity*, 385 U.S. 498, n.5 (quoting Norman Lamm, *The 5th Amendment and Its Equivalent in Jewish Law*, 17 Decalogue J. 1, 12 (Jan. - Feb. 1967)). Its purpose is to protect the individual against the state in the context of the individual's actual or imminent criminal prosecution. In non-criminal settings, it does not serve that primary function and entails other considerations such as the rights of other litigants in civil proceedings, *see, e.g., LaSalle Bank Lake View*, or the interest of prison officials in institutional order, *see, e.g., Baxter.*

The second critical reality that has been ignored is that invocation of the Fifth Amendment privilege in *Cunningham*, on the one hand, and invocation of the Fifth Amendment privilege in *Murphy, Baxter, LaSalle Bank Lake View, Daniels*, on the other hand, are apples and oranges. While adverse inferences can be drawn from use of the privilege in non-criminal contexts, *see Chan* 1997 WL 532765, *4 (App. A8-A9), *no* inference can be drawn from silence in criminal proceedings, *Griffin v. California*, 380 U.S. 609 (1965)—proceedings that include those of grand juries, *see Bank of Nova Scotia v. United States*, 487 U.S. 250, 259 (1988). While the Seventh Circuit has now melded the two different uses of the privilege to suggest that there is but one privilege that applies in all contexts, there is no basis or precedent for its having done so.

In light of the new privilege that the court has fashioned in this case, the third reality ignored is that Officer Chan invoked his Fifth Amendment privilege when he appeared before a federal grand jury without any assurance that his testimony would be immunized. He did not, for example, invoke his privilege against self-incrimination in the context of an employment review or in seeking a job promotion. *Gardner* and *Cunningham* squarely applied to and controlled Officer Chan's appearance before the federal grand jury, and in that proceeding and context, Officer Chan was entitled to much more than "a watered-down version of [his] constitutional rights." *Garrity*, 385 U.S. at 500.

B. The Third Circuit's decision in *FOP v. Philadelphia* is without application or analogy and fails to support a compromised Fifth Amendment right against self-incrimination.

In the end, the Seventh Circuit rests its holding of qualified immunity on the Third Circuit's "holding" in *FOP v. Philadelphia, supra*, and that court's observation "that it could find no case that had held that any action short of discharge or suspension constituted . . . [a] threat [coercive with respect to Fifth Amendment rights]," *Chan*, 1997 WL 532765, *4 (App. A9). The court has misrepresented the Third Circuit's holding and failed to grasp the significance of its observation.

The court in *FOP* did not consider the use of the Fifth Amendment in the context of criminal proceedings. *FOP Lodge* was not a § 1983 action. Brought by a policemen's union, the appeal (the third) was from an injunction sought and issued to prevent the implementation of screening procedures for a new, selective unit to investigate corruption in the police department. *FOP*, 859 F.2d at 277. After numerous controls had been implemented to insure confidentiality, the Third Circuit dissolved the injunction. It did *not* hold, as the Seventh Circuit has represented, that "the lateral transfer of a police officer did not amount to the sort of penalty that could be considered coercive with respect to Fifth Amendment rights." *Chan*, 1997 WL 532765, *4 (App. A9). The Third Circuit *held:*

> The basis of our reversal of the district court's decision . . . is a simple one. The privilege against self-incrimination applies to *compelled* incrimination. We do not agree with the district court that the police officers in this case are compelled within the meaning of the fifth amendment to fill out the application for the [selective unit]. . . .
>
> . . . . Nothing in the record supports the district court's finding that an officer who declines to fill out the questionnaire will be demoted, either by suffering a diminution in rank or by suffering a decrease in salary.

859 F.2d at 282, 283 (emphasis in the original).

Nothing in the Third Circuit's holding addresses or abrogates the well-established law defined in *Garrity, Gardner, Conlisk*, and *Cunningham* and applicable in this case. Unlike the members of the Philadelphia FOP who could choose (or not) to apply to the new select unit, Officer Chan had no choice in whether or not he would appear before the federal grand jury on August 9, 1989. He had been served with a subpoena; his appearance was not voluntary. Had he known on August 9, 1989 that the new deputy superintendent was going to transfer him from the CTTF for exercising his right against self-incrimination, Officer Chan would have unquestionably waived his right against self-incrimination, *see supra* p. 20—a waiver before a federal grand jury without a grant of immunity where criminal prosecution could have resulted. Under the well-established law defined in *Garrity, Gardner, Conlisk*, and *Cunningham*, the incrimination in this case was *compelled* incrimination.

Just as it has misrepresented the holding in *FOP*, the Seventh Circuit has misapprehended the significance of the Third Circuit's note that it had not found, and the union had not cited, "a single case *in the employment context* in which any consequence short of suspension or dismissal from employment has been held to constitute compulsion for fifth amendment purposes." 859 F.2d at 282-83 n.10 (emphasis added). The reason for this lack is not—as the Seventh Circuit has apparently concluded—because the law was not clearly established in 1989. If that were the case, then there would be a plethora of cases involving the exercise of the Fifth Amendment and defenses of qualified immunity. Quite simply, the reason why there are none is because, as was seen, *see supra* pp. 22-23, the law was so well-defined by the mid-1970s, and compliance so well implemented, that no other public official has done what the defendant did in this case since then.

III. The Impact of the Seventh Circuit's Holding in this Case Will be Substantial

This was a case where "[l]egal uncertainty play[ed] no role." *Elliott v. Thomas*, 937 F.2d 338, 343 (CA 7 1991), *cert. denied*, 502

U.S. 1121 (1992). The jury had to make factual credibility determinations in deciding whether the defendant was responsible for the transfer and whether Officer Chan was substantially penalized. Properly instructed that it could return a verdict in favor of Officer Chan only if it found that the evidence showed that "the defendant caused [him] to be substantially penalized as a result of [his] exercise of his fifth amendment right and, second, that, in performing the acts alleged, the defendant acted intentionally or recklessly," R. 972; Defendant. Inst. No. 22 (SA104), the jury did exactly that and found that the defendant acted intentionally or recklessly. Its award of $121,000 in punitive damages underscored the strength of that finding.

This Court's review is required, and the writ should be granted, because the Seventh Circuit has transformed a factual determination into a legal uncertainty. In that transformation, it has unsettled well-established Fifth Amendment and qualified immunity law and created a new watered-down Fifth Amendment right against self-incrimination that does not differentiate between criminal and civil contexts. If allowed to stand, the impact of the court's decision will be substantial in at least three areas.

One is in the area of law enforcement. Police officers testifying before federal grand juries will no longer have the Fifth Amendment right guaranteed to them in *Garrity*, *Gardner*, and *Cunningham*—unless the penalty imposed is, at a minimum, discharge or suspension. The rules and regulations written and promulgated in jurisdictions around the country in the wake of *Garrity*, *Gardner*, and *Conlisk*—rules and regulations like the CPD's Rule 51—can be rewritten or, as in this case, conveniently ignored. Despite the highly visible and negative repercussions of "dumping" throughout all of the law enforcement community, *see supra* p. 14, the Seventh Circuit has now sanctioned that practice as an appropriate means for coercing either self-incrimination or waiver of the right against self-incrimination without violating the Fifth Amendment. Superintendents, chiefs, and commanders now have the license to "dump"—with impunity *and* immunity—to retaliate against exercises of the Fifth Amendment right against self-incrimination. Given the highly

visible and negative repercussions of "dumping" in the Chicago law enforcement community, Rule 51 has been effectively rescinded.

The second area of substantial impact is in the law of qualified immunity. Not only in direct conflict with this Court's decisions, the Seventh Circuit's implicit holding that only particularized cases on point count as precedent in determining whether law is clearly established virtually guarantees a qualified immunity defense to all public officials for all but the most stupid and mundane constitutional violations. In addition, in cases like this case, the holding that the clearly established standard requires factually indistinguishable precedent has the curious, but actual, effect of imputing objective ignorance in the face of admitted subjective knowledge, *see supra* p. 12—certainly not an effect envisioned by the Court in adopting a reasonable person standard in *Harlow*, *see supra* p. 21.

The third area in which the court's holdings will have substantial impact is in the development of the law. The court has presumptively held that the law was not clearly established in 1989. But what the court has really held is that the lateral transfer of a police officer—in this case "dumping"—is not the sort of penalty that can ever be considered coercive with respect to the Fifth Amendment. In other words, such a transfer is not, as a matter of law, a substantial penalty. In so holding, the court has foreclosed the possibility of any jury ever again considering whether, as a factual issue, the "dumping" of a police officer in retaliation for the exercise of a constitutionally guaranteed right is either a substantial penalty or an infringement imposed on the exercise of that right.

The district court in this case substituted its judgment for that of the jury by putting a *de facto* dollars and cents price tag on a police officer's exercise of the Fifth Amendment before a federal grand jury. The court of appeals similarly substituted its judgment for that of the jury by concluding that anything less than an officer's suspension or dismissal for invoking the Fifth Amendment is trifling and cannot be coercive. The jury in this case found that the penalty exacted was substantial and anything but trifling. This Court's review is required, and the writ should be granted, to restore the Fifth Amendment privilege so carefully delineated by the Court in

Garrity, *Spevack*, *Gardner*, *Uniformed Sanitation Men*, *Turley*, and *Cunningham*, and correctly applied by the jury below.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the United States Court of Appeals for the Seventh Circuit to review the court's opinion.

Respectfully submitted,

RUTH E. VANDEMARK*
RALPH N. GLADER
LAW OFFICES OF RUTH E. VANDEMARK
225 West Washington Street, Suite 2200
Chicago, Illinois 60606
(312) 419-7162

SUSAN BOGART
LAW OFFICES OF SUSAN BOGART
Ten South LaSalle Street, Suite 3505
Chicago, Illinois 60603
(312) 726-9060

Attorneys for Cory D. Chan

* Counsel of Record

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 96-1683, 96-1784

CORY D. CHAN,

Plaintiff-Appellant, Cross-Appellee,

v.

EDWARD S. WODNICKI, individually and in his former capacity as Deputy Superintendent of the Chicago Police Department,

Defendant-Appellee, Cross-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 C 4671—**Elaine E. Bucklo,** *Judge.*

ARGUED JUNE 6, 1997—DECIDED AUGUST 29, 1997

Before CUMMINGS, RIPPLE and ROVNER, *Circuit Judges.*

RIPPLE, *Circuit Judge.* Following a trial, the jury returned a verdict in favor of the plaintiff, Officer Cory D. Chan, for $21,000 in compensatory damages, $10,000 for pain and suffering, and $121,000 in punitive damages. Both parties filed post-trial motions, and the district court granted the defendant Deputy Superintendent Wodnicki's motion for judgment as a matter of law. Officer Chan now appeals, and Deputy Superintendent Wodnicki conditionally cross-appeals. For the reasons set

forth in the following opinion, we affirm the judgment of the district court.

I
BACKGROUND

A. *Facts*

Mr. Chan is a police officer with the Chicago Police Department. The defendant, Deputy Superintendent Wodnicki, was the Deputy Superintendent for the Intelligence Division in which Officer Chan served. In that division, Officer Chan was assigned from 1985 to 1989 to a multi-jurisdictional unit, the Chicago Terrorist Task Force ("CTTF"). In that unit, members of the Chicago Police Department served with other state and federal officers. The CTTF required that its members, including Chan, have a "top secret" security clearance from the federal government. As a member of the CTTF, Officer Chan worked well over forty hours a week and received added compensation for the extra hours. He also had use of an official vehicle for police business.

In 1989, Officer Chan received a subpoena commanding his appearance before a grand jury. Officer Chan assumed that the grand jury was investigating illegal activity in the Chinatown section of the City. He previously had been assigned there. After speaking to an attorney provided by his union, Officer Chan invoked his fifth amendment privilege against self-incrimination. He alleges that the questions he was asked during the grand jury proceedings were not specific questions related to his official duties as a police officer. He also testified at trial that he was not advised that any answers provided would not be used against him in a criminal context. After his grand jury appearance, he reported to his superiors that he had invoked his fifth amendment privilege before the grand jury. When he

returned to the station, his superiors called him in, and he again told them that he did not answer the grand jury's questions. After this meeting, one of the supervisors told him that he could lose his security clearance.

Shortly thereafter, Deputy Superintendent Wodnicki transferred Officer Chan to another division. In that division, the officer was assigned to duty that required that he wear a uniform. After this transfer, Officer Chan's security clearance was revoked.[1] His rank and salary, however, remained the same. Deputy Superintendent Wodnicki testified that he had removed Officer Chan from the CTTF for the following reasons: He did not know why Officer Chan had asserted his fifth amendment privilege and did not know the subject of the grand jury investigation; he considered Officer Chan a security risk; he was told that the FBI was going to revoke the clearance, and the FBI no longer wanted Officer Chan on the CTTF. Officer Chan was replaced on the CTTF by someone who had been in Deputy Superintendent Wodnicki's chain of command before he became Deputy Superintendent.

The union filed a grievance over the transfer on Officer Chan's behalf. On August 20, 1990, an arbitrator ordered Chan's reinstatement in the Intelligence Section, but determined that he was without jurisdiction to order Chan's reinstatement to the CTTF. In April 1991, Officer Chan was renominated to the CTTF and applied for his security clearance. By the time of the trial, his clearance had not been approved. In this § 1983 action, he claims that he was transferred in retaliation for asserting his constitutional right against self-incrimination. In his complaint, Officer Chan alleged that the transfer caused economic and reputational harm. Economically, he had

---

[1] There was testimony indicating that his security clearance was revoked because he was no longer on the CTTF.

fewer opportunities for overtime with the plain-clothes unit. Reputationally, he alleged harm because he had to wear a uniform, his car was taken away, and his new assignment was less prestigious.

B. *Proceedings in the District Court*

Prior to trial, the district court dismissed from the action several defendants named in the complaint. The Chicago Police Department was dismissed because it was not a suable entity. The § 1983 claim against the City was dismissed because Officer Chan had not alleged that this transfer was the direct result of any policy. Officer Chan sought to amend his complaint, but the magistrate judge denied that request and stated that the amended complaint did not cure this problem. Officer Chan never requested that this ruling be reviewed by the district court.[2] Deputy Superintendent Wodnicki's motion for summary judgment on the ground of qualified immunity was denied by the district court. At that time, the district court was of the view that there was a genuine issue of material fact as to whether the transfer constituted such a substantial penalty upon Officer Chan that it violated his right against self-incrimination, guaranteed by the Fifth Amendment as made applicable to the states through the Fourteenth Amendment.

At trial, the jury returned a verdict for Officer Chan. It awarded him $21,000 for economic loss and $10,000 for pain and suffering. It also awarded $121,000 in punitive damages.

---

[2] Officer Chan's failure to bring this matter to the attention of the district court constitutes waiver of the issue. *See* Fed. R. Civ. P. 72(a); *cf. Swaback v. American Info. Techs. Corp.*, 103 F.3d 535, 544 n.26 (7th Cir. 1996).

The district court then granted Deputy Superintendent Wodnicki's motion for judgment as a matter of law. It held that he was entitled to qualified immunity because, at the time of Officer Chan's transfer, it was not clearly established that the transfer constituted a burden sufficiently grave to constitute an infringement on the officer's Fifth Amendment rights. The court reasoned that it was not clearly established at the time of the transfer that Deputy Superintendent Wodnicki would have known that $21,000 was a sufficient penalty to infringe on the officer's rights. *See* R.244 at 6-7.

II

DISCUSSION

Government officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The official is entitled to this immunity if, at the time he acted, he reasonably could have determined that his actions did not violate clearly established law. *See Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Because of the "expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office . . . [and] the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials," *Harlow*, 457 U.S. at 814 (internal quotation, citations and brackets omitted), qualified immunity bars suits for damages against "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). "The inquiry focuses on the objective legal reasonableness of the action, not the state of mind or good faith of the officials in question." *Erwin v. Daley*, 92 F.3d 521, 525

(7th Cir. 1996) (citing *Anderson*, 483 U.S. at 639), *cert. denied*, 117 S. Ct. 958 (1997).

In *Siegert v. Gilley*, 500 U.S. 226, 232 (1991), the Supreme Court of the United States noted that, in evaluating a claim of qualified immunity, a court is essentially presented with two questions: (1) whether the plaintiff has asserted a violation of the constitutional right at all; and (2) whether the defendant's actions were objectively reasonable in light of then-prevailing standards. *See Donovan v. City of Milwaukee*, 17 F.3d 944, 947 (7th Cir. 1994). A negative answer to either of these questions requires a determination that the officer is immune from a suit for damages.

Courts have often found their task easier by approaching immediately the second question; we shall follow that methodology today. Under the well-established analysis, the plaintiff must establish[3] that, at the time that the defendant official acted, the law was so "clearly established" that "a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. To establish this criterion, the plaintiff must show either a reasonably analogous case that has both articulated the right at issue and applied it to a factual circumstance similar to the one at hand or that the violation was so obvious that a reasonable person necessarily would have recognized it as a violation of the law. *See Erwin*, 92 F.3d at 525. In short, the act of the defendant must be assessed at a sufficiently specific level of generality to show that the conduct at issue is forbidden. *See Rakovich v. Wade*, 850 F.2d 1180, 1209-10 (7th Cir. 1987) (en banc), *cert. denied*, 488 U.S. 968 (1988). Qualified immunity ought to be available unless "the law was clear in relation to the specific facts confronting the

---

[3] *See Erwin*, 92 F.3d at 525 (holding that the plaintiff has the burden of establishing that the law was clearly established).

public official when he acted." *Colaizzi v. Walker*, 812 F.2d 304, 308 (7th Cir. 1987).

We therefore turn to an examination of the law at the time that Deputy Superintendent Wodnicki acted. The basic principles that govern this area were stated succinctly by the Supreme Court in *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977). In that case, the Court stated the watershed rule that the "Fifth Amendment privilege against compelled self-incrimination protects grand jury witnesses from being forced to give testimony which may later be used to convict them in a criminal proceeding." *Id.* at 804-05. "[W]hen a State compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a subsequent criminal prosecution." *Id.* at 805. The Court went on to note that "a State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself." *Id.*; *see also Minnesota v. Murphy*, 465 U.S. 420, 434 (1984). In *Cunningham*, the Court also made it clear that governmental coercion can take many forms and that economic sanctions are just one form of pressure that may be brought to bear on an individual in an effort to force that person to give up the right against self-incrimination. The "touchstone of the Fifth Amendment is compulsion, and direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the Amendment forbids." *Cunningham*, 431 U.S. at 806.[4]

---

[4] To the extent the district court's opinion can be read as holding that the Fifth Amendment is violated only by economic burdens, it does not state fully the law.

Therefore, the government may not threaten the sort of action that may coerce an employee into forfeiting his right against self-incrimination. The Supreme Court has made clear that the threat of job loss for a public employee is a sufficient threat to require that the employee be granted immunity from prosecution before he is required to answer questions about his public responsibilities. *See Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation*, 392 U.S. 280 (1968); *Gardner v. Broderick*, 392 U.S. 273, 278 (1968); *Garrity v. New Jersey*, 385 U.S. 493 (1967); *see also Lefkowitz v. Turley*, 414 U.S. 70 (1973) (holding that disqualification of a contractor from public contracts for five years is a sufficiently serious threat to require immunity before testimony can be compelled); *Spevack v. Klein*, 385 U.S. 511, 516 (1967) (holding that the "threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege") (plurality opinion).

On the other hand, the jurisprudence of the Supreme Court and of this court also makes clear that not every consequence of invoking the Fifth Amendment is considered sufficiently severe to amount to coercion to waive the right. Rather, the effect must be sufficiently severe to be "capable of forcing the self-incrimination which the Amendment forbids." *Cunningham*, 431 U.S. at 806; *see Murphy*, 465 U.S. at 435 (holding that mere obligation to appear before a probation officer does not "give rise to a self-executing privilege," but that result "may be different" if the state conditioned probation on not invoking the Fifth Amendment privilege); *Baxter v. Palmigiano*, 425 U.S. 308, 316-20 (1976) (holding that permitting the drawing of an adverse inference in a civil matter, here a prison disciplinary proceeding, did not amount to an impermissible burden on Fifth Amendment rights); *see*

also LaSalle Bank Lake View v. Seguban, 54 F.3d 387 (7th Cir. 1995) (holding that inference is permissible from non-movant party's invocation of Fifth Amendment right in reply to summary judgment motion, but only when that invocation is weighed with all other evidence); *Daniels v. Pipefitters' Ass'n Local Union*, 983 F.2d 800, 802 (7th Cir. 1993) (discussing the permissible inference in civil litigation).

Deputy Superintendent Wodnicki transferred Officer Chan from the Task Force to patrolman duties. The officer lost no rank or pay. His only concrete detriment was the loss of two incidental benefits that went with the position on the task force, the opportunity to earn additional compensation through overtime assignments and the use of a government car. Even when one factors into the balance the loss of the prestige that goes with such a special assignment, we cannot say that, at the time that Deputy Superintendent acted, it was clear that Officer Chan's invocation of the Fifth Amendment exacted the sort of deprivation that the case law said was forbidden. As the City of Chicago points out in its brief, shortly before Deputy Superintendent Wodnicki acted, the Court of Appeals for the Third Circuit had held that the lateral transfer of a police officer did not amount to the sort of penalty that could be considered coercive with respect to Fifth Amendment rights. *See Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 859 F.2d 276, 282-83 (3d Cir. 1988). Indeed, the court noted specifically that it could find no case that had held that any action short of discharge or suspension constituted such a threat. *Id.* at 283 n.10. Officer Chan, who has the burden on this issue, also has not been able to find such authority.

Conclusion

Because the grant of judgment as a matter of law on the ground of qualified immunity was correct, we must affirm the judgment of the district court.

AFFIRMED

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

916 F.Supp. 804

Cory D. CHAN, Plaintiff,

v.

CITY OF CHICAGO, a municipality, the Chicago Police Department, an instrument of a municipality, Leroy Martin, individually and in his capacity as Superintendent of the Chicago Police Department, Edward S. Wodnicki, individually and in his former capacity as Deputy Superintendent of the Chicago Police Department, Bureau of Investigative Services, Elgia Cook, individually and in his capacity as Chief of the Organized Crime Division, Ronald T. Moran, individually and in his former capacity as Commander of the Intelligence Section, and John Guarnieri, individually and in his capacity as a Lieutenant in the Intelligence Section of the Chicago Police Department and as the Lieutenant in charge of the Chicago Terrorist Task Force, Defendants.

No. 91 C 4671.
United States District Court,
N.D. Illinois, Eastern Division.

Feb. 20, 1996.

Police officer brought § 1983 action against police department, city, and other individuals in police department, including deputy superintendent, alleging violation of Fifth and Fourteenth Amendments. After trial, deputy superintendent filed for motion as matter of law based on qualified immunity. The District Court, Bucklo, J., held that deputy superintendent was entitled to qualified immunity.

Motion granted.

* * * * *

Susan Bogart, Law Offices of Susan Bogart, Chicago, IL, Latasha R. Thomas, Chicago, IL, and Ruth Elaine Van Demark, Law Offices of Ruth E. Van Demark, Chicago, IL, for plaintiff.

Patricia M. Carroll-Smit, City of Chicago, Law Department Corporation Counsel, David J. Seery, City of Chicago, Law Department, and Susan S. Sher, Corporation Counsel, City of Chicago, Chicago, IL, for defendants.

MEMORANDUM OPINION AND ORDER

BUCKLO, District Judge.

Plaintiff, Cory D. Chan, alleged that defendant, Edward S. Wodnicki, removed him from his position with the Chicago Terrorist Task Force ("Task Force") and with the Intelligence Section of the Chicago Police Department ("CPD") for asserting his Fifth Amendment privilege before a federal grand jury on August 9, 1989.[1] Mr. Chan claimed that by transferring him out of these positions in August, 1989, Mr. Wodnicki violated his rights under the Fifth and Fourteenth Amendments to the U.S. Constitution and Section 1983, 42 U.S.C. § 1983. The defendants filed a motion for summary judgment arguing that Mr. Wodnicki was entitled to qualified immunity, which I denied. Chan v. City of Chicago, No. 91 C 4671, 1995 WL 431238, *3 (N.D.Ill. July 19, 1995). The case proceeded to trial, after which the jury rendered a verdict against Mr. Wodnicki and in

---

[1] Mr. Chan returned to the Intelligence Section in July, 1995.

favor of Mr. Chan. The jury awarded Mr. Chan $21,000 for lost earnings and benefits; $10,000 for pain, suffering, and mental anguish; and $121,000 in punitive damages.

Mr. Wodnicki has renewed his motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b). For the following reasons, his motion is granted.

Standard of Review

"Judgment as a matter of law is appropriate only when there can be but one conclusion from the evidence and inferences reasonably drawn therefrom." Bronk v. Ineichen, 54 F.3d 425, 428 (7th Cir.1995) (quoting McNabola v. Chicago Transit Authority, 10 F.3d 501, 515 (7th Cir. 1993); see also Tapia v. City of Greenwood, 965 F.2d 336, 338 (7th Cir.1992).

Qualified Immunity

The doctrine of qualified immunity accords "public officials the benefit of legal doubts" by shielding all officials from civil liability, except those who are "plainly incompetent" or "who knowingly violate the law." Kernats v. O'Sullivan, 35 F.3d 1171, 1176-77 (7th Cir.1994). Qualified immunity protects public officials from individual liability if their conduct did not violate "clearly established . . . constitutional rights of which a reasonable person would have known." Id. (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed. 2d 396 (1982)). It is the plaintiff's burden to demonstrate the existence of a clearly established constitutional right. Id.

Moreover,

> the right allegedly violated must have been 'clearly established' in a 'particularized' sense and 'the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'

Id. (quoting Anderson v. Creighton, 483 U.S. 635, 639-40, 107 S.Ct. 3034, 3038-39, 97 L.Ed.2d 523 (1987)).

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The privilege extends to protect an individual from being compelled "to answer official questions put to him in any . . . proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." LaSalle Bank Lake View v. Seguban, 54 F.3d 387, 389 (7th Cir.1995) (citations omitted). The Supreme Court prohibits not only direct compulsion but also "practices that are coercive in that they make the exercise of the privilege 'costly.'" Id. (citing Spevack v. Klein, 385 U.S. 511, 515, 87 S.Ct. 625, 628, 17 L.Ed.2d 574 (1967)). Thus, sanctions for exercising Fifth Amendment rights constituting a "substantial penalty," including those with "serious economic consequences, such as the loss of employment or state contracts," are forbidden. Lefkowitz v. Cunningham, 431 U.S. 801, 805, 97 S.Ct. 2132, 2135-36, 53 L.Ed.2d 1 (1977); LaSalle Bank Lake View v. Seguban, supra, 54 F.3d at 389-91, 394 (citing Supreme Court cases cited infra and indicating in civil proceeding that $2,820,000 judgment against defendant who invoked Fifth Amendment privilege may not be prohibited penalty if defendant's silence weighed in light of the evidence shows that plaintiff deserves judgment).

The penalties that the Supreme Court has held may not be meted out in return for asserting the Fifth Amendment privilege include the loss of a job, loss of state contracts, loss of future contracting privileges with the state, loss of political office, and loss of the right to run for political office in the future. See Spevack v. Klein, supra, 385 U.S. at 514-19, 87 S.Ct. at 627-30 (attorney may not be disbarred for exercising Fifth Amendment privilege); Gardner v. Broderick, 392 U.S. 273, 278-79, 88 S.Ct. 1913, 1916-17, 20 L.Ed.2d 1082 (1968) (public employees may not be forced to choose between termination from employment and self-incrimination); Lefkowitz v. Turley, 414 U.S. 70, 84-85, 94 S.Ct. 316, 325-26, 38 L.Ed.2d 274 (1973) (architects may not be forced to choose between loss of state contracts and self-incrimination); Lefkowitz v. Cunningham, supra, 431 U.S. at 804-09, 97 S.Ct. at 2135-38 (political party officer may not be required to decide between loss of office and five-year bar on holding another office on the one hand and self-incrimination on the other hand); Garrity v. New Jersey, 385 U.S. 493, 500, 87 S.Ct. 616, 620, 17 L.Ed.2d 562 (1967) (statements obtained under threat of discharge from employment could not be used in subsequent criminal proceedings).

Mr. Chan claims violation of a constitutional right by alleging that he was substantially penalized in return for asserting the Fifth Amendment privilege. However, Mr. Chan was not suspended or terminated from his position as a police officer with the CPD. He was transferred out of the Task Force and the Intelligence Section. In 1989, i.e., the year that Mr. Chan was transferred, whether a transfer could violate an individual's rights under the Fifth Amendment was questionable. See FOP, Lodge No.

5 v. City of Philadelphia, 859 F.2d 276, 282 n. 10 (3rd Cir.1988) ("The FOP has not cited a single case in the employment context in which any consequence short of suspension or dismissal from employment has been held to constitute compulsion for fifth amendment purposes. We have searched and found none ourselves.").

In resolving the defendants' motion for summary judgment, I did not grant Mr. Wodnicki's request for qualified immunity because I found that the evidence before the court created a jury question as to the extent of Mr. Chan's pecuniary injury. See Chan v. City of Chicago, supra, No. 91 C 4671, 1995 WL 431238 at *3. "Although the qualified immunity determination is a legal question it is not answered in the abstract but in reference to the particular facts of the case." Eversole v. Steele, 59 F.3d 710, 717 n. 8 (7th Cir.1995). I concluded that even if Mr. Chan had not lost his job, if his loss of income was great, it might be considered so substantial a penalty that Mr. Wodnicki could be charged with knowing that it could result in compulsion.

Following trial, the jury awarded Mr. Chan only $21,000 for lost earnings and benefits. Mr. Chan's transfer—a sanction which the jury found cost him $21,000—does not rise to the level of penalties which have been labeled "substantial" because it is not comparable to the penalties which the Supreme Court has found impose an unconstitutional cost on the exercise of the Fifth Amendment privilege.[2]

---

[2] Mr. Wodnicki contends that the jury's $21,000 award was not supported by the evidence presented at trial. Def.'s Memo., pp. 6-7 n. 2. It is unnecessary to resolve this argument: be-

(continued...)

Mr. Chan was not required to relinquish his livelihood—he did not lose his job as a police officer in the CPD, and his base pay was not affected. Notably, Mr. Chan argued that he suffered financially only because he lost overtime opportunities and the use of a car to drive to and from work. Moreover, it is enlightening to view the $21,000 loss over the period from August, 1989 to July, 1995, the time during which Mr. Chan claims he incurred the loss. According to the jury, Mr. Chan should have earned $274,782.51 over those years. In actuality, he earned $253,782.51. Thus, he lost only 7.6 percent of his income. A loss of 7.6 percent of one's income is not the type of injury that either the Supreme Court or the Seventh Circuit has in the past found to be substantial.

---

[2] (...continued)

cause I hold that the cases do not support a claim that Mr. Wodnicki should have known that $21,000 was a substantial penalty, the cases certainly do not indicate that he should have known that a lesser figure was such a penalty. Mr. Chan does not argue that in deciding if he suffered a substantial penalty, I should take into account the jury's award of $10,000 for pain, suffering, and mental anguish. Doing so would not change my analysis or conclusion.

Although Mr. Chan's response to Mr. Wodnicki's motion discusses the amounts he feels he lost as a result of being transferred, Pl.'s Resp., pp. 4-5, 12-13, nowhere in the response does Mr. Chan argue that the jury should have awarded him more than $21,000 in lost earnings and benefits. Mr. Chan also has not filed any post-trial motion, e.g., a motion for additur, requesting that the court take steps to increase the jury's compensatory damage award. In fact, in Plaintiff's Response to Defendant's Motion to Alter or Amend the Judgment, p. 4, Mr. Chan argues that the jury's compensatory damage award is "rational, rationally connected to the evidence and 'roughly comparable' to awards made in similar cases."

See LaSalle Bank Lake View v. Seguban, supra, 54 F.3d at 389.

A 7.6 percent loss in income is not something that most wage earners probably would think insignificant. Nevertheless, it is not the equivalent of a loss of job, loss of the privilege to contract with the state, loss of political office or loss of the right to run for political office in the future. Thus, whether or not an appellate court might hold that it is so substantial as to constitute an impermissible penalty in the future, any right not to face this penalty was not clearly established in 1989.

Mr. Chan argues that the injury to his reputation renders his transfer a substantial penalty, citing Lefkowitz v. Cunningham, supra, 431 U.S. at 806, 97 S.Ct. at 2136, for the proposition that the touchstone of the Fifth Amendment is compulsion, and direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the Amendment forbids.

The Supreme Court in Cunningham discussed the ramifications of the appellee's loss of his political offices:

> Appellee's party offices carry substantial prestige and political influence, giving him a powerful voice in recommending or selecting candidates for office and in other political decisions. The threatened loss of such widely sought positions, with their power and perquisites, is inherently coercive. Additionally, compelled forfeiture of these posts diminishes appellee's general reputation in his community.
>
> There are also economic consequences; appellee's professional standing as a practicing lawyer would suffer by his removal from his political offices under these circumstances. Further, . . . appellee [would be

> barred] from holding any other party or public office for five years. Many such offices carry substantial compensation.

Id. at 807, 97 S.Ct. at 2136. It is unclear whether the jury found that the transfer injured Mr. Chan's reputation. The jury awarded $10,000 for pain, suffering, and mental anguish, but Mr. Chan agreed that the verdict form should not specifically provide for assessing damages for reputation injury. Tr. 881-83. At any rate, the evidence presented by Mr. Chan at trial did not demonstrate that he suffered an injury equivalent to the appellee's injury in Cunningham.

In conclusion, at the time of Mr. Chan's transfer in 1989, the law was not clearly established that the type of injury inflicted upon him violated his rights under the Fifth Amendment; therefore, Mr. Wodnicki is qualifiedly immune from liability.[3]

---

[3] Mr. Chan argues that the jury award does not include front pay, which he says increases his damage. Mr. Chan filed a post-trial motion requesting front pay and permission to present additional evidence on this issue. My July 31, 1995 order instructed Mr. Chan that any motion seeking front pay should "refer specifically to all evidence that will show that he continues to suffer a loss of pay." Mr. Chan's motion flaunts this order. Although Mr. Chan insists that there is evidence in the trial record supporting an award of front pay, he makes few references to the record. In his entire brief, only two sentences are followed by citations to the record. Three of these cites are incomplete, with blank spaces where page numbers should be. Checking the few complete cites that Mr. Chan provides, I find that he did not demonstrate that he continues to suffer diminished income. Accordingly, the loss of income found by the jury cannot be increased by any prediction of damage continuing into the future.

Conclusion

For the foregoing reasons, Mr. Wodnicki's motion for judgment as a matter of law is granted.

APPENDIX C

67 F.3d 137

Cory D. CHAN, Plaintiff-Appellee,
v.
Edward S. WODNICKI, Defendant-Appellant.

No. 95-2730.
United States Court of Appeals, Seventh Circuit.
Submitted July 21, 1995.
Decided Sept. 29, 1995.
Rehearing Denied Nov. 15, 1995.

Police officer sued supervisory employee of police department under § 1983, alleging that he was transferred in retaliation for having pleaded Fifth Amendment immunity before grand jury. Supervisory employee moved for summary judgment on ground of qualified immunity, which motion was denied by the United States District Court for the Northern District of Illinois, Elaine E. Bucklo, J., 1995 WL 431238. Supervisory employee filed notice of appeal, and after appeal was certified by district judge as frivolous, requested stay of trial pending determination of his appeal. After stay was denied, trial was held, and supervisory employee lost, postjudgment motions were filed, and supervisory employee requested filing of his brief on appeal from denial of qualified immunity be delayed until postjudgment motions were decided. The Court of Appeals, Posner, Chief Judge, held that: (1) claim of immunity survived denial of stay; (2) appeal from denial of immunity claim before trial was moot; and (3) appeal from denial of motion to postpone briefing of appeal was moot.

Ordered accordingly.

* * * * *

Susan Bogart, Chicago, IL, Ruth E. VanDemark, Ralph N. Glader, Chicago, IL, for Cory D. Chan.

Lawrence Rosenthal, Deputy County Counsel, Benna R. Solomon, Susan S. Sher, Office of the Corporation Counsel, Appeals Division, Chicago, IL, for Edward S. Wodnicki.

Before POSNER, Chief Judge, and EASTERBROOK and ROVNER, Circuit Judges.

POSNER, Chief Judge.

We have before us a motion by the appellant to postpone the briefing of his appeal. The motion raises a question of interpretation of Apostol v. Gallion, 870 F.2d 1335 (7th Cir.1989). The background can be explained briefly. Chan, a Chicago police officer, brought suit against Wodnicki (and others), under 42 U.S.C. § 1983, claiming that Wodnicki, a supervisory employee of the police department, had transferred Chan to a less desirable job within the department in retaliation for Chan's having pleaded the Fifth Amendment before a grand jury. Wodnicki moved for summary judgment on the ground of qualified immunity. This was denied and he filed a notice of appeal. The district judge certified the appeal as frivolous. Wodnicki asked us to stay the trial of Chan's case against him, which was about to begin, pending determination of his appeal. We denied the stay without a statement of reasons. The trial was held, and Wodnicki lost. Both sides have filed postjudgment motions with the district judge. Wodnicki now asks us to allow him to delay the filing of his brief on appeal from the denial of quali-

fied immunity until the postjudgment motions are decided. He believes that, however those motions are decided, one or even both sides will appeal and it would be more efficient to brief that appeal (or those appeals) together with the appeal from the denial of qualified immunity.

The question that has moved us to write is: Does Wodnicki still *have* an appeal from the denial of qualified immunity, or did it go down the drain either when we denied his request for a stay of the trial or when the trial was held? We explained in Apostol that because official immunity, the immunity invoked by Wodnicki, is immunity from trial as well as from a judgment for damages, the filing of a notice of appeal from the denial of a motion to dismiss the suit on grounds of immunity automatically stays the trial until the appeal is resolved. A *frivolous* appeal is a nullity, however; it does not engage the jurisdiction of the court of appeals, just as a frivolous suit does not engage the jurisdiction of the district court; and this is as true of an appeal from a denial of immunity as of any other appeal. Apostol held that if the district judge certifies that the appeal from the denial of immunity is frivolous, the judge can proceed with the trial. The defendant can obtain our immediate review of the district judge's determination of frivolousness by asking us to stay the trial, and that is what Wodnicki did here, unsuccessfully. The point of the procedure adopted in Apostol is to prevent a defendant from disrupting the district court's trial schedule by filing a frivolous appeal.

The first question presented by Wodnicki's new motion is the status of the appeal from the denial of immunity after the stay is denied. Should denial of the stay be deemed a determination that the appeal is indeed frivo-

lous? If so, that denial is tantamount to dismissal of the appeal, and Wodnicki's motion to postpone the briefing of it should be dismissed as moot because there is no appeal to brief. The second question is whether, even if Wodnicki's claim of immunity is not moot, the appeal is moot because the denial of the stay allowed the trial to go forward, and the appeal was only from the decision of the district court to allow the trial to go forward.

The claim of immunity survives the denial of a stay, as our decision in McMath v. City of Gary, 976 F.2d 1026, 1030-31 (7th Cir.1992), assumed, although without discussion of the issue. Cf. United States v. Chiattello, 804 F.2d 415, 417 (7th Cir.1986); United States v. Cannon, 715 F.2d 1228, 1231 (7th Cir.1983). A request for a stay is a request for extraordinary relief, equitable in character, and just as with the denial of a motion for a preliminary injunction—of which a motion for a stay is the appellate analogue, Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 387 (7th Cir.1984)—the denial of the request need not express any view of the merits of the underlying appeal, let alone a definitive view. Wodnicki's motion did not make a sufficiently compelling case to delay a trial, in a four-year-old case, that was scheduled to begin in just four days. It does not follow that he should be barred from arguing in the more leisurely setting of a fully briefed appeal that his claim of immunity, far from being frivolous as the district court believed it to be, is meritorious and should be accepted. The trial has not made his claim of immunity moot, for while the immunity is from trial as well as from judgment, by the same token it is from judgment as well as from trial. Mitchell v. Forsyth, 472 U.S. 511, 527-28, 105 S.Ct. 2806, 2816, 86 L.Ed.2d 411 (1985); Abel v. Miller,

904 F.2d 394, 397 (7th Cir.1990); Apostol v. Gallion, supra, 870 F.2d at 1339.

Had the stay been denied because we agreed with the district court that the claim was frivolous, or otherwise held it to be without merit, the appeal would have been dismissed at the same time, but it was not; we did not decide the merits. The denial of the stay was a ruling merely on the equities of postponing trial, not on the merits of the appeal. We add that our conclusion that the denial of the stay did not moot Wodnicki's claim to immunity is in accordance with the only decision that we have found on the question. Langley v. Adams County, 987 F.2d 1473, 1477 (10th Cir.1993). But in further and only slightly oblique support for our conclusion we point out that decisions dealing with the parallel issue whether a claim of double jeopardy (a defense, like immunity, to trial as well as to judgment) survives the denial of a motion to stay the defendant's trial conclude, likewise, that it does. United States v. Leppo, 634 F.2d 101, 105 (3d Cir.1980); United States v. Hines, 689 F.2d 934 (10th Cir.1982).

The question whether Wodnicki's claim of immunity is moot must not be confused with the question whether his appeal from the denial of that claim *before trial* is moot. Since the appeal was taken before the trial, the only ruling that it could challenge was the ruling that Wodnicki must stand trial. A challenge to a judgment against him would have been premature, because the case had not yet gotten as far as the entry of a judgment, and the judgment might be in his favor. Since all that was at stake in the appeal was whether Wodnicki must stand trial, the trial mooted the appeal by eliminating the stake. Wodnicki intends to appeal from the judgment

against him—if it stands, after the judge has ruled on the postjudgment motions—and, as we have made clear in this opinion, our action in denying him the stay that he asked for did not moot his claim of immunity. He is free to present that claim in a new appeal, an appeal from the judgment, whichever way it goes, and whichever party appeals. But his original appeal is moot and is therefore dismissed as moot, while the motion to postpone the briefing of that appeal is dismissed for the same reason.

APPENDIX D

[Dated July 21, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 91 C 4671

CORY D. CHAN,

Plaintiff,

v.

CITY OF CHICAGO, a municipality, the CHICAGO POLICE DEPARTMENT, an instrument of a municipality, LEROY MARTIN, individually and in his capacity as Superintendent of the Chicago Police Department, EDWARD S. WODNICKI, individually and in his former capacity as Deputy Superintendent of the Chicago Police Department, Bureau of Investigative Services, ELGIA COOK, individually and in his capacity as Chief of the Organized Crime Division, RONALD T. MORAN, individually and in his former capacity as Commander of the Intelligence Section, and JOHN GUARNIERI, individually and in his capacity as a Lieutenant in the Intelligence Section of the Chicago Police Department and as the Lieutenant in charge of the Chicago Terrorist Task Force,

Defendants.

CERTIFICATION THAT APPEAL IS FRIVOLOUS

On July 20, 1995, defendant Edward S. Wodnicki filed a notice of appeal from my decision dated July 18, 1995,

denying his motion for summary judgment on the ground of qualified immunity. For the following reasons, I certify that this appeal is frivolous under the standards set forth in *Apostol v. Gallion,* 870 F.2d 1335 (7th Cir. 1989).

This case involves the claim of a Chicago policeman, Cory D. Chan, who complains that the actions of defendant Edward S. Wodnicki, Deputy Superintendent of the Chicago Police Department, in removing him from the Chicago Terrorist Task Force and the Intelligence Section of the Chicago Police Department in 1989 because he asserted his Fifth Amendment privilege against self-incrimination before a federal grand jury violated his rights under the Fifth and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1983. The law has been clear at least since *Gardner v. Broderick,* 392 U.S. 273 (1968), and *Lefkowitz v. Cunningham,* 431 U.S. 801 (1977), that the government cannot penalize the assertion of the privilege against self-incrimination by taking adverse actions against a policeman, at least not if the action involves transfer to a less desirable position with loss of pay and benefits. *See also Confederation of Police v. Conlisk,* 489 F.2d 891, 895 n.2 (7th Cir. 1973), *cert. denied,* 416 U.S. 956 (1974) (rule is the same although a federal rather than state grand jury is involved). (Although there is an exception under *Gardner v. Broderick, supra,* 392 U.S. at 278-79, where grand jury questions pertain "specifically, directly, and narrowly" to performance of an officer's official duties, there is no evidence that Mr. Chan was penalized for this reason.)

On December 9, 1991, Judge Norgle, to whom this case was then assigned, denied Mr. Wodnicki's motion to dismiss, holding that under the cases cited above, Mr. Wodnicki was not entitled to qualified immunity. *Chan v.*

City of Chicago, 777 F. Supp. 1437 (N.D. Ill. 1991). Mr. Wodnicki did not appeal. This case proceeded through discovery and was transferred to Judge Castillo in June, 1994. In November, 1994, it was transferred to me. On December 13, 1994, I set this case for trial on July 24, 1995. On April 18, 1995, various defendants moved for summary judgment. While most of the motion involved the question whether there was sufficient evidence to connect various defendants to the actions against Mr. Chan, Mr. Wodnicki sought summary judgment on the ground of qualified immunity. The motion was fully briefed on June 29, 1995. On July 6, 1995, I indicated that I would rule against Mr. Wodnicki and in favor of various other defendants. My written decision was issued on July 18.

In my July 18 decision, I held that there was a question of fact as to whether Mr. Chan was substantially penalized (his affidavit stated that he lost the use of an automobile and overtime in the amount of approximately $6,500 per year for every year since his removal from his prior position) when he was demoted to the position of patrolman. There is also a question of fact as to the motive behind Mr. Wodnicki's decision to transfer Mr. Chan. My decision that a question of fact exists on these issues is not reviewable until after a final decision on the merits. *Johnson v. Jones,* 115 S.Ct. 2151 (June 12, 1995).

Apostol v. Gallion, supra, provides that where an appeal is clearly baseless or improper, the district court may certify to the court of appeals that the appeal is frivolous and continue with the trial. 870 F.2d at 1339. The appeal in this case is frivolous because the law was clearly established in 1989 that a government official such as Mr. Wodnicki could not substantially penalize an

employee such as Mr. Chan for asserting his Fifth Amendment privilege before a grand jury. Furthermore, the only questions to be presented to the Seventh Circuit on appeal are whether my evidentiary rulings were correct in finding a question of fact. That appeal is precluded by *Johnson v. Jones, supra.*[1]

Based on this certification, unless a stay is entered, trial in this case will proceed at 9:30 a.m. on Monday, July 24, 1995, as previously scheduled.

ENTER ORDER:

/s/ Elaine E. Bucklo
Elaine E. Bucklo
United States District Judge

Dated: July 21, 1995

---

[1] *Apostol v. Gallion, supra,* also provides that parties may delay too long in appealing and thus forfeit any right to avoid trial. 870 F.2d at 1339. ("Defendants who play games with the district court's schedule forfeit their entitlement to a pretrial appeal.") This is such a case. Mr. Wodnicki has had since December, 1991 to appeal the decision denying his motion to dismiss based on his claim of qualified immunity. He did not do so until two business days before trial in 1995. If this case is not tried as scheduled, the next available date for trial on my docket will be in 1996.

APPENDIX E

Not Reported in F.Supp.
Cite as: 1995 WL 431238 (N.D.Ill.)

Cory D. CHAN, Plaintiff,
v.
CITY OF CHICAGO, a municipality, the Chicago Police Department, an instrument of a municipality, Leroy Martin, individually and in his capacity as Superintendent of the Chicago Police Department, Edward S. Wodnicki, individually and in his former capacity as Deputy Superintendent of the Chicago Police Department, Bureau of Investigative Services, Elgia Cook, individually and in his capacity as Chief of the Organized Crime Division, Ronald T. Moran, individually and in his former capacity as Commander of the Intelligence Section, and John Guarnieri, individually and in his capacity as a Lieutenant in the Intelligence Section of the Chicago Police Department and as the Lieutenant in charge of the Chicago Terrorist Task Force, Defendants.

No. 91 C 4671.
United States District Court,
N.D. Illinois, Eastern Division.
July 18, 1995.

Susan Bogart, Law Offices of Susan Bogart, Chicago, IL, for plaintiff.

Susan Sher, City of Chicago, Law Dept. Corp. Counsel, Chicago, IL, for defendants.

E2

MEMORANDUM OPINION AND ORDER

BUCKLO

*1 Defendants, LeRoy Martin, Edward S. Wodnicki, Elgia Cook, Ronald T. Moran, and John Guarnieri, in their individual capacities, have filed a motion for summary judgment on Counts One and Six of the complaint.[1] For the reasons discussed below, the defendants' motion with respect to Count One is granted as to Mr. Martin, Mr. Cook, Mr. Moran, and Mr. Guarnieri and denied as to Mr. Wodnicki. The motion as to Count Six is granted.

Count One: Mr. Chan's Fifth Amendment Rights

In Count One of his complaint, Mr. Chan alleges that the defendants removed him from his position with the Chicago Terrorist Task Force ("Task Force") and with the Intelligence Section of the Chicago Police Department ("CPD") for asserting his Fifth Amendment privilege before a federal grand jury on August 9, 1989. Mr. Chan claims that by transferring him out of these positions and into a position as a patrol officer in the 9th District of the Department, the defendants violated his rights under the Fifth and Fourteenth Amendments to the U.S. Constitution and Section 1983, 42 U.S.C. § 1983.

An individual can be held liable under Section 1983 if he "caused or participated" in a constitutional depriva-

---

[1] Counts One and Six against the individual defendants in their individual capacities are all that remain in this lawsuit. Judge Norgle previously dismissed Count One as to the City and the individual defendants in their official capacities and Counts Two, Three, Four, Five and Seven in their entirety. Chan v. City of Chicago, 777 F.Supp. 1437 (N.D.Ill.1991).

tion. East v. City of Chicago, 719 F.Supp. 683, 691 (N.D. Ill.1989) (citations omitted). Negligent conduct is not enough. The individual must have acted with knowledge of, or with reckless disregard to, a plaintiff's Constitutional rights. Rascon v. Hardiman, 803 F.2d 269, 274 (7th Cir.1986); Smith v. Rowe, 761 F.2d 360, 369 (7th Cir.1982). Primary participation is not required if an official could take action to remedy a Constitutional violation and, with knowledge of the illegal conduct, does nothing. Id.

The only evidence linking Mr. Martin, the Superintendent of the Chicago Police Department during the relevant time period, to Mr. Chan's transfer is a document with Mr. Martin's name and title typed at the end. The document, dated September 8, 1989, is entitled "Personnel Order: 89-109" and lists various individuals' reassignments, including Mr. Chan's reassignment to the 9th District. Pl.'s Ex.P. Mr. Martin testified in his deposition that this document is the final order effectuating the personnel transfers listed. Martin Dep. 7. The First Deputy Superintendent, Charles Ford, prepared the Personnel Order based on recommendations from the bureau deputy superintendents. 12(m) Stmt. p 54; Martin Dep. 6-7. Mr. Martin for the most part would review personnel orders only for changes in his immediate staff, which included several patrol officers, an administrative assistant, an executive assistant, typists and stenographers. 12(m) Stmt. p 55; Martin Dep. 8, 11; Ford Dep. 36-37. Mr. Martin testified in his deposition that he does not know Mr. Chan, is unaware of any transfers, details or circumstances pertaining to Mr. Chan and did not even know why his deposition was being taken. Martin Dep. 25. Mr. Chan has not produced any evidence rebutting

Mr. Martin's testimony. Accordingly, there is no evidence in the record that Mr. Martin knowingly or recklessly participated in the alleged violation of Mr. Chan's rights. Mr. Martin is entitled to summary judgment.

*2 Mr. Cook was the Chief of the Organized Crime Division within the Bureau of Investigative Services. The defendants assert in paragraph 57 of their Rule 12(m) Statement that "[d]efendant Cook did not make or participate in the decision to reassign plaintiff from the Terrorist Task Force of the Intelligence Section." In his Rule 12(n) Statement, Mr. Chan responds that he "can neither admit nor deny paragraph 57" and does not cite to any evidence in the record contradicting that paragraph. Mr. Chan's response is insufficient to adequately rebut the assertions in paragraph 57 and, therefore, he is deemed to have admitted them. See Schulz v. Serfilco, Ltd., 965 F.2d 516, 518-19 (7th Cir.1992). Consequently, summary judgment will be entered in favor of Mr. Cook.

Mr. Moran, the Commander of the Intelligence Section of the Organized Crime Division of the Bureau of Investigative Services at all relevant times, testified at the arbitration hearing on the grievance Mr. Chan filed challenging his transfer from the Task Force to the Intelligence Section and then to the 9th District. Mr. Moran stated that he was not involved in the decision to remove Mr. Chan from the Task Force and return him to the Intelligence Section. Chan Arb.Tr. 158. Mr. Moran further testified in his deposition in this case that his superiors ordered Mr. Chan's reassignment without any request from Mr. Moran. Moran Dep. 68. In fact, Mr. Moran was notified of Mr. Chan's removal from the Task Force after it was effective. Moran Dep. 69-71.

The only evidence that Mr. Chan presents connecting Mr. Moran to Mr. Chan's reassignment out of the Task Force and the Intelligence Section and into the 9th District are two documents signed by Mr. Moran. One of the documents simply states that "[e]ffective August 11, 1989, P.O. Cory Chan, # 14071, has been reassigned from the Terrorist Task Force to the Intelligence Section, Unit 193." The other document states that Mr. Moran has received a call from the "First Deputy's Office," and that effective August 17, 1989, Mr. Chan is to be detailed to the 9th District. Pl.'s Exs. N, O. Without further information about the documents and in light of Mr. Moran's testimony, I cannot conclude that these documents are anything more than memorializations of decisions made by others.[2] Accordingly, because Mr. Chan has not pro-

---

[2] At a hearing on July 6, 1995, I informed the parties that I had concluded that summary judgment was appropriate on defendants' motions with respect to Messrs. Martin, Cook and Guarnieri, that summary judgment would be denied as to Mr. Wodnicki, and that I was inclined based on the record before me to grant summary judgment on Mr. Chan's claim against Mr. Moran. Mr. Chan's case against Mr. Moran was based on the two documents referred to in the text. I informed Mr. Chan that if he could identify before the end of the day anything in the record that would indicate that the documents evidenced some decision by Mr. Moran, I would consider the evidence. Mr. Chan failed to comply with my order. On July 14, 1995, however, Mr. Chan filed a "supplemental submission" and supplemental exhibits in opposition to defendants' motion for summary judgment with respect to each of the individual defendants, which Mr. Chan noticed for hearing on July 18, 1995. Mr. Chan's supplemental submission is filed too late. This case is set for trial on July 24, 1995. Mr. Chan was required to submit his evidence in opposition to the motion for summary judgment by June 15, 1995. He cannot wait until after I have indicated that the record fails to support his claim

(continued...)

duced evidence to rebut Mr. Moran's testimony that he did not participate in the decision to reassign Mr. Chan, Mr. Moran is entitled to summary judgment.

Mr. Guarnieri, a lieutenant in the Intelligence Section during the relevant time period, stated in his affidavit that he "did not make or participate in the decision to reassign Cory Chan" from the Task Force or the Intelligence Section. Guarnieri Aff. p 3. Mr. Chan has failed to present any evidence linking Mr. Guarnieri to his reassignment. Mr. Guarnieri is entitled to summary judgment.

Mr. Wodnicki, Deputy Superintendent of the Bureau of Investigative Services at all relevant times, testified in his deposition that he made the decision to transfer Mr. Chan out of the Intelligence Section. Wodnicki Dep. 66. He also testified at the arbitration hearing on Mr. Chan's grievance that he had ultimate responsibility for the transfer of Mr. Chan from the Task Force into the Intelligence Section and then to the 9th District. Chan Arb. Tr. 123. Mr. Wodnicki asserts that he removed Mr. Chan from the Task Force because the FBI revoked Mr. Chan's top secret security clearance, which all Task Force members are required to maintain, rather than because Mr. Chan asserted the Fifth Amendment privilege before the grand jury. The only evidence submitted in support of this assertion is hearsay. Wodnicki Dep. 67-75. Moreover, there is evidence in the record showing that Mr. Chan's transfer from the Task Force was effective before

---

[2] (...continued)
to submit evidence that should have been submitted earlier. Accordingly, Mr. Chan's "supplemental submission" will not be considered.

his top secret security clearance was revoked. Pl.'s Exs. L, N; Moran Dep. 68-71.

*3 Mr. Wodnicki contends that he is entitled to qualified immunity and, as a result, cannot be held liable to Mr. Chan for violating his Fifth Amendment rights. An official cannot prevail in his qualified immunity defense if "the legal norms governing [his] behavior were clearly established at the time of the challenged actions." Upton v. Thompson, 930 F.2d 1209, 1212 (7th Cir.1991) (citations omitted).

Since 1977, it has been well established that a police officer may not be given "substantial penalties" in return for exercising his Fifth Amendment right to not provide incriminating testimony against himself. Lefkowitz v. Cunningham, 431 U.S. 801, 805 (1977). See also Gardner v. Broderick, 392 U.S. 273 (1968). Additionally, if a State attempts to compel a person to testify by

> present[ing] [him] with the 'Hobson's choice' of incriminating himself or suffering a penalty, and he nevertheless refuses to respond, the State cannot constitutionally make good on its threat to penalize him.

Minnesota v. Murphy, 465 U.S. 420, 443 (1984) (Marshall, J., dissenting) (citations omitted). See also Lefkowitz v. Cunningham, supra, 431 U.S. at 806-807.[3] On

---

[3] A police officer can be sanctioned for refusing "to answer questions specifically, directly, and narrowly relating to the performance of his official duties" after being told that "the answers he gives and the fruits thereof cannot be used against him in criminal proceedings." Gardner v. Broderick, supra, 392 U.S. at 278; Confederation of Police v. Conlisk, 489 F.2d 891, 894 (7th Cir.1973). Based on the evidence in the record before

(continued...)

August 8, 1989, the day before Mr. Chan testified to the grand jury, one of the FBI supervisors assigned to the Task Force told Mr. Chan that if he were to assert his Fifth Amendment privilege before the grand jury, his top secret security clearance would be revoked. 12(m) Stmt. p 33. Sergeant Hilliard of the CPD knew of the FBI's warning. Chan Arb.Tr. 37-38. Because Task Force members are required to have top secret security clearance, revocation of Mr. Chan's security clearance would result in his discharge from the Task Force.

On August 9, 1989, Mr. Chan asserted his Fifth Amendment privilege before the grand jury. Subsequently, he was transferred out of the Task Force to the Intelligence Section and then into the 9th District. As a result of being removed from the Task Force, Mr. Chan says he lost certain benefits such as use of a car and annual payments of approximately $6,000. 12(n) Stmt. p 62; Chan Aff. p 6, p. 5. After being reassigned from the Intelligence Section, he was no longer eligible to work certain overtime. Id. The evidence before the Court creates a question of fact as to whether Mr. Chan was substantially penalized for exercising his rights under the Fifth Amendment.

The defendants argue that there is no law specifically stating that an individual may not be transferred in retaliation for asserting the Fifth Amendment privilege and, therefore, Mr. Wodnicki deserves qualified immuni-

---

[3] (...continued)
the Court, I cannot rule as a matter of law that Mr. Chan was asked and refused to answer such questions after being given such a warning.

ty. The defendants' reasoning cannot carry the day. If Mr. Chan's testimony is believed, his reassignment out of the Task Force and the Intelligence Section certainly impacted him economically. The transfer clearly could be considered a "substantial penalty" under Lefkowitz v. Cunningham, supra, 431 U.S. at 805-807. Mr. Wodnicki's motion for summary judgment is, therefore, denied.

Count Six: The Collective Bargaining Agreement

*4 As a member of the Fraternal Order of Police Chicago Lodge No. 7 ("FOP"), Mr. Chan is covered by the collective bargaining agreement between the FOP and the City of Chicago ("CBA"). 12(m) Stmt. p 65. In Count Six of the complaint, Mr. Chan seeks to recover damages for the defendants' alleged breach of the CBA. I agree with the defendants that to award damages to Mr. Chan based on the CBA, a jury would be required to interpret or apply the CBA. However, under the CBA, any dispute concerning the interpretation or application of the agreement is to be settled through the specified grievance and arbitration procedures. 12(m) Stmt. p 66. The Illinois Public Labor Relations Act requires collective bargaining agreements such as the one at issue in this lawsuit to

> contain a grievance resolution procedure which shall apply to all employees in the bargaining unit and shall provide for final and binding arbitration of disputes concerning the administration or interpretation of the agreement unless mutually agreed otherwise.

5 ILCS 315/8. The Act mandates exhaustion of arbitration procedures before seeking assistance from the courts. 5 ILCS 315/16.

> It is well established in Illinois that once a contract containing a valid arbitration clause has been executed, the parties are irrevocably committed to arbitrate all disputes arising under the contract.

International Association of Firefighters Local # 23 v. City of East St. Louis, 206 Ill.App.3d 580, 565 N.E.2d 264, 267, 152 Ill.Dec. 22 (5th Dist.1990). After exhausting the arbitration procedures, public employees may attempt to redress a breach of a collective bargaining agreement by bringing a lawsuit only in "the circuit court in the county in which the public employer transacts business or has its principal office." 5 ILCS 315/16; Board of Trustees of Prairie State Community College, District 515 v. Prairie State College Federation of Teachers, Local 3816, 184 Ill.App.3d 363, 540 N.E.2d 794, 796, 132 Ill.Dec. 872 (1st Dist.1989).

On August 16, 1989, Mr. Chan filed a grievance through his collective bargaining representative. 12(m) Stmt. p 67. An arbitration hearing on the grievance took place on March 8 and April 12, 1990. 12(m) Stmt. p 68. The issue decided by the arbitrator was whether the CPD violated the CBA by reassigning Mr. Chan from the Task Force to the Intelligence Section and then to the 9th District. Arb. Award, pp. 17-18, Defs.' Ex. R. The arbitrator concluded that Mr. Chan's transfer from the Task Force did not violate the CBA but his transfer from the Intelligence Section did. 12(m) Stmt. p 69. Pursuant to the arbitrator's award, Mr. Chan was reinstated to the Intelligence Section effective August 20, 1990 and agreed to accept $3,424.50 (144.25 hours of overtime pay) and 72.25 hours of compensatory time in settlement of his grievance. 12(m) Stmt. p 70. Under Illinois law, if Mr. Chan has exhausted his arbitration remedy under the

CBA, an issue which I do not decide, his only option is to bring a claim in the appropriate circuit court. If he has not exhausted his remedies under the CBA, he must do so. This Court does not have jurisdiction to decide Mr. Chan's claim against his employer for breach of the CBA. Accordingly, the defendants' motion for summary judgment on Count Six is granted.

Release of Claim

*5 In November, 1989, Mr. Chan filed a lawsuit against the CPD seeking overtime compensation under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. ("FLSA"). In response to questions posed to him by the City when taking his deposition in that case, Mr. Chan testified that the CPD retaliated against him for filing the FLSA action by not permitting him to work days and not giving him a steady assignment or partner during his tenure in the 9th District. 12(m) Stmt. p 75; 12(n) Stmt. p 75. The defendants argue that Mr. Chan is claiming in this lawsuit that while in the 9th District he was not assigned to work days or given a steady partner in retaliation for asserting his Fifth Amendment privilege before the grand jury. But, the defendants assert, Mr. Chan has released such a claim as a result of settling the FLSA lawsuit and agreeing to waive all claims "that were alleged in the lawsuit or arise out of the same factual allegations or relate in any way to the claims that were alleged in the lawsuit." FLSA Settlement Agreement, p 4, p. 2, Defs.' Ex. X.

The complaint certainly appears to allege that Mr. Chan was given unattractive assignments while working in the 9th District as a result of having pled the Fifth

Amendment. Complaint, p 25, p. 10.[4] However, I need not decide whether Mr. Chan has released such a claim. Count One against Mr. Wodnowski in his individual capacity is the only count left of the complaint. For Mr. Chan to recover against Mr. Wodnowski under Section 1983 on the basis that he was given poor assignments while working in the 9th District, Mr. Chan would have to show that Mr. Wodnowski was involved in giving Mr. Chan those assignments. See East v. City of Chicago, supra, 719 F.Supp. at 691 (citations omitted). Mr. Chan has presented no evidence to the Court indicating that Mr. Wodnowski in any way took part in that process. In fact, Mr. Chan testified in his deposition that the watch commander or the desk sergeant typically gave him his assignments. Chan Dep. 196-97. Accordingly, Mr. Chan may not argue in this lawsuit that he was punished for asserting the Fifth Amendment privilege as indicated by the assignments he received while working in the 9th District.

Conclusion

For the reasons set forth above, the defendants' motion for summary judgment on Count One is granted as to all defendants except for Mr. Wodnicki, and the motion for summary judgment on Count Six is granted.

---

[4] The defendants also cite to pages 432-434 of Mr. Chan's deposition as support for their assertion that Mr. Chan is claiming he was retaliated against when in the 9th District for asserting his Fifth Amendment rights. Defendants misrepresent Mr. Chan's testimony. The cited pages merely indicate that while in the 9th District, Mr. Chan asked if his assignments could be changed.

APPENDIX F

777 F.Supp. 1437

Cory D. CHAN, Plaintiff,

v.

CITY OF CHICAGO, a municipality, the Chicago Police Department, an instrument of a municipality, LeRoy Martin, individually and in his capacity as Superintendent of the Chicago Police Department, Edward S. Wodnicki, individually and in his former capacity as Deputy Superintendent of the Chicago Police Department, Bureau of Investigative Services, Elgia Cook, individually and in his capacity as Chief of the Organized Crime Division, Ronald T. Moran, individually and in his former capacity as Commander of the Intelligence Section, and John Guarnieri, individually and in his capacity as a Lieutenant in the Intelligence Section of the Chicago Police Department and as the Lieutenant in charge of the Chicago Terrorist Task Force, Defendants.

No. 91 C 4671.
United States District Court,
N.D. Illinois, E.D.

Dec. 9, 1991.

Police officer of Chinese ancestry brought action against city, police department and police department officials alleging he was improperly transferred for asserting his Fifth Amendment right against self-incrimination before federal grand jury. Defendants moved to dismiss. The District Court, Norgle, J., held that: (1) allegations were insufficient to state municipal liability claim; (2) officer adequately pleaded Fifth Amendment

substantive due process violation; (3) defendants were not entitled to qualified immunity; and (4) officer did not state claim for violation of equal protection.

Motion granted in part and denied in part.

Susan Bogart, Chicago, Ill., for plaintiff.

Patricia M. Carroll-Smit, City of Chicago, Law Dept., Corp. Counsel, Chicago, Ill., for defendants.

ORDER

NORGLE, District Judge.

Before the court is the defendants' motion to dismiss the plaintiff's complaint. For the following reasons, the motion is granted in part and denied in part.

FACTS

Plaintiff Cory D. Chan ("Chan") has been a Chicago police officer since 1973.[1] In July 1984, he was assigned to the Intelligence Section of the Chicago Police Department, Organized Crime Division, Bureau of Investigative Services ("Intelligence Section"). The following March, Chan began serving on the newly formed Chicago Terrorist Task Force ("Task Force"), a multi-agency group including the Intelligence Section, the Federal Bureau of Investigation, the U.S. Secret Service, and the Illinois State Police. Chan remained on the Task Force until he was transferred on August 14, 1989, at which time he

---

[1] The facts set forth herein are drawn from Chan's complaint.

was receiving $500 monthly in Authorized Uncontrollable Overtime and had use of an FBI-supplied car as a Task Force member. The only Chicago police officers eligible for the Task Force were in the Intelligence Section.

Chan alleges that he was transferred from the Task Force for asserting his Fifth Amendment right against self-incrimination before a federal grand jury on August 9, 1989. During his appearance before the grand jury, Chan was told that his testimony was sought in connection with alleged gambling activities in Chinatown. The federal gambling investigation bore no relation to Chan's duties with the Intelligence Section or the Task Force. Chan promptly reported to his police department superiors, as is required by police regulations, both his receipt of a grand jury subpoena in July 1989, and following his grand jury appearance, his assertion of Fifth Amendment privilege. Chan also reported that the grand jury investigation was unrelated to his police duties. On April 11, 1990, Chan testified under a grant of immunity before the same federal grand jury before which he had earlier asserted the Fifth Amendment.

Chan was transferred from the Intelligence Section on August 14, 1989, and the next day was reassigned as a patrol officer in the 9th District working afternoon and night watches, which were inconsistent with his seniority and experience. Chan's FBI security clearance, required for Task Force members, was revoked on August 16, 1989.

A grievance pursuant to the collective bargaining agreement covering Chicago police officers was filed on Chan's behalf on August 16, 1989 by the Fraternal Order of Police. The collective bargaining agreement provided

in part that "No officer covered by this Agreement shall be suspended, relieved from duty or disciplined in any manner without just cause." (Sec. 8.1) The agreement also barred discrimination in transfers or assignments based on race or national origin, among other factors. (Sec. 10.2) An arbitrator ruled in Chan's favor on August 20, 1990, ordering reinstatement of Chan to the Intelligence Section and payment of benefits lost as a result of his transfer from that section. The arbitrator, however, found he lacked the power to order Chan's reinstatement to the Task Force. Based on the arbitration ruling, Chan was immediately transferred back to the Intelligence Section but has not been paid for any lost benefits.

Chan brought this lawsuit on July 24, 1991. Count One of the complaint claims that the removal of Chan from the Intelligence Section and the Task Force for asserting his Fifth Amendment privilege violated his due process rights under the Fifth and 14th Amendments and 42 U.S.C. § 1983. Count Two alternatively claims that if the questions asked him by the grand jury were related to performance of his official police duties, his assertion of Fifth Amendment privilege was due to the ineffective assistance of his attorney, and therefore his removal from the Intelligence Section and Task Force violated his due process rights. Count Three alleges that Chan, being of Chinese ancestry, was treated differently from police officers not of Chinese ancestry who asserted their Fifth Amendment rights before the same federal grand jury, in violation of Chan's equal protection rights under the Fifth and 14th Amendments and § 1983.

Count Four claims that Chan was not provided with a hearing or opportunity to be heard prior to his allegedly punitive transfer in violation of his equal protection

rights. Count Five, apparently under Illinois common law, asserts that Chan's transfer based on accusations of his untrustworthiness stigmatized him and damaged his reputation. Count Six claims that Chan's transfer was without due cause and therefore violated his rights under the collective bargaining agreement. Count Seven seeks punitive damages against the defendants for their alleged willful, unlawful, malicious and wanton disregard of Chan's rights and feelings.

The defendants' motion to dismiss contends that the entire complaint is defective because, among other reasons, it fails to allege any violation of a federal constitutional right as is required to state a claim under § 1983, that even if such a right were alleged, the individual defendants are entitled to qualified immunity, and the City of Chicago cannot be held liable because Chan does not adequately allege that a city policy or custom caused his alleged constitutional injury.

DISCUSSION

On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the allegations of the complaint as well as the reasonable inferences to be drawn from them are taken as true. Perkins v. Silverstein, 939 F.2d 463, 466 (7th Cir.1991). The court, however, need not strain to find inferences favorable to the plaintiff which are not apparent on the face of the complaint. Coates v. Illinois St. Bd. of Educ., 559 F.2d 445, 447 (7th Cir.1977). The plaintiff need not set out in detail the facts upon which a claim is based, but must allege sufficient facts to outline the cause of action. Id. The complaint must state either direct or inferential allegations concerning all

material elements necessary for recovery under the relevant legal theory. Mescall v. Burrus, 603 F.2d 1266, 1269 (7th Cir.1979). The court is not required to accept legal conclusions either alleged or inferred from pleaded facts. Carl Sandburg Village Condominium Ass'n No. 1 v. First Condominium Dev. Co., 758 F.2d 203, 207 (7th Cir.1985). Dismissal under Rule 12(b)(6) is improper unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Papapetropoulous v. Milwaukee Transp. Servs., Inc., 795 F.2d 591, 594 (7th Cir.1986).

Counts One through Four of Chan's complaint allege constitutional violations under 42 U.S.C. § 1983. In support of these claims, Chan must show (1) an action taken under color of state law, (2) which caused a deprivation of a constitutionally protected right. Brown v. City of Lake Geneva, 919 F.2d 1299, 1301 (7th Cir.1990) (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 150, 90 S.Ct. 1598, 1604, 26 L.Ed.2d 142 (1970)). Additionally, to establish municipal liability under § 1983, Chan must show that the City of Chicago caused the deprivation through operation of an unconstitutional city policy or custom, Woods v. Michigan City, 940 F.2d 275, 277 (7th Cir.1991) (citing Monell v. Department of Social Servs., 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978)), or as a result of inadequate training or supervision which amounted to deliberate indifference toward constitutional protections. Graham v. Sauk Prairie Police Comm'n, 915 F.2d 1085, 1100-01 (7th Cir.1990) (citing City of Canton v. Harris, 489 U.S. 378, 388-92, 109 S.Ct. 1197, 1204-06, 103 L.Ed.2d 412 (1989)). The same requirements apply to claims against the individual defendants in their official capacities, which are effectively

claims against the city. Perkins v. Silverstein, 939 F.2d 463, 469 (7th Cir.1991) (citing Kentucky v. Graham, 473 U.S. 159, 165-66, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 (1985)).

Under Monell, municipal liability only attaches when a municipal official or employee's "acts or edicts may fairly be said to represent official policy." Woods, 940 F.2d at 278 (quoting Monell, 436 U.S. at 694, 98 S.Ct. at 2037). That can only occur when "the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." Id. (quoting Pembaur v. City of Cincinnati, 475 U.S. 469, 481, 106 S.Ct. 1292, 1299, 89 L.Ed.2d 452 (1986)). Whether a particular official has such authority is a question of state law. Id. at 279 (citing City of St. Louis v. Praprotnik, 485 U.S. 112, 123, 108 S.Ct. 915, 923, 99 L.Ed.2d 107 (1988)).

Chan does not allege that he was transferred pursuant to a formal municipal policy, but rather that he was transferred in violation of a formal policy, embodied in the police collective bargaining agreement. The only official whom Chan specifically alleges had final policymaking authority is Police Superintendent LeRoy Martin. Chan does not allege that Martin ordered the allegedly unconstitutional transfer. Therefore, regardless of whether Martin actually had such authority, the transfer was not the direct result of any municipal policy or custom.

Nonetheless, municipal liability could result if the transfer was caused by a municipal policymaker's "deliberate indifference." To plead a deliberate indifference claim adequately, Chan must allege facts showing that his transfer resulted from deficiencies in police procedures "*so obvious, and the inadequacy so likely to result*

in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." Graham, 915 F.2d at 1101 (emphasis in original) (quoting City of Canton, 489 U.S. at 390, 109 S.Ct. at 1205).

Here again, Chan's allegations fall short. Chan has alleged a single incident, his transfer, rather than a repeated, continuing type of problem which a municipal policymaker could or should have corrected in time to prevent Chan's alleged injury. There is also no identification of a specific gap in police procedures which should have been filled to prevent easily foreseeable constitutional violations. See Gibson v. City of Chicago, 910 F.2d 1510, 1521 (7th Cir.1990).

Chan's allegations are therefore insufficient to state a municipal liability claim either caused by a municipal policy or custom or by the deliberate indifference of a municipal policymaker. Consequently, the City of Chicago is dismissed as a defendant and the official capacity claims against the individual defendants are dismissed.

The Chicago Police Department is also dismissed, with prejudice, because it has no separate legal existence apart from the City of Chicago, and the department is therefore not a suable entity. Reese v. Chicago Police Dept., 602 F.Supp. 441, 443 (N.D.Ill.1984).

The defendants raise a number of additional arguments which require a closer look at Chan's claims. Counts One and Two allege alternative substantive due process violations based on Chan's transfer from the Intelligence Section and Task Force. Chan claims he had a property interest in his Intelligence Section and Task Force positions, of which Chan was deprived unconstitu-

tionally as punishment for his assertion of the Fifth Amendment before the federal grand jury. Count One alleges that the grand jury inquiry was unrelated to Chan's official duties. Count Two alternatively alleges that, in the event the grand jury inquiry is found to have been related to Chan's official duties, his assertion of the Fifth Amendment was not "knowing, intelligent and wilful" but was rather the result of ineffective assistance of counsel.

It is well established that a police officer cannot be dismissed for refusing on Fifth Amendment grounds to answer a grand jury's questions unless those questions pertained "specifically, directly, and narrowly" to performance of the officer's official duties. Gardner v. Broderick, 392 U.S. 273, 278-79, 88 S.Ct. 1913, 1916, 20 L.Ed. 2d 1082 (1968); Confederation of Police v. Conlisk, 489 F.2d 891, 895 (7th Cir.1973), cert. denied sub nom. Rochford v. Confederation of Police, 416 U.S. 956, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974)). Chan, however, was not dismissed. He allegedly was transferred to a less desirable assignment with less benefits, in effect a demotion. Nonetheless, the Supreme Court has held "that government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized." Lefkowitz v. Cunningham, 431 U.S. 801, 806, 97 S.Ct. 2132, 2136, 53 L.Ed.2d 1 (1977). "[D]irect economic sanctions and imprisonment" are not the only forbidden penalties. Id.

The Seventh Circuit has expressed doubt that a lateral transfer without a pay cut could ever constitute a sufficient deprivation to violate the 14th Amendment due process clause. Greenberg v. Kmetko, 840 F.2d 467, 475

(7th Cir.1988) (citing Parrett v. City of Connorsville, 737 F.2d 690, 693 (7th Cir.1984), cert. dismissed, 469 U.S. 1145, 105 S.Ct. 828, 83 L.Ed.2d 820 (1985)). Nonetheless, that court found it proper for a jury to decide whether transfer to an undesirable position constituted a constructive demotion.[2] Id. Here, Chan has alleged a violation of the Fifth Amendment, and has adequately alleged a demotion or constructive demotion: transfer to a less desirable position with loss of overtime pay and car-use benefits. Count One therefore adequately pleads a Fifth Amendment substantive due process violation.

Count Two, however, is defective. If the grand jury inquiry related to Chan's official duties, the City could constitutionally discipline him for his Fifth Amendment assertion. Chan offers no explanation or support for his novel assertion that his transfer would still be unconstitutional because he received ineffective assistance of counsel when he asserted the Fifth Amendment. An ineffective assistance of counsel claim that satisfies the requirements of Strickland v. Washington, 466 U.S. 668, 687-97, 104 S.Ct. 2052, 2064-70, 80 L.Ed.2d 674 (1984), could entitle Chan to relief from a criminal conviction or sentence. Chan offers no basis to extend the potential relief to his employment situation. Count Two is therefore dismissed.

The defendants contend that they are entitled to qualified immunity because it was not clearly established at the time of Chan's transfer that it was unconstitutional.

---

[2] A transfer to a undesirable position has also been described as a "lateral arabesque." Greenberg v. Kmetko, 922 F.2d 382, 383 (7th Cir.1991) (citing Laurence J. Peter and Raymond Hull, The Peter Principle, 38-39 (1969)).

Public officials who perform discretionary functions are entitled to qualified immunity from civil liability to the extent their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Upton v. Thompson, 930 F.2d 1209, 1211-12 (7th Cir.1991) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)). A "clearly established" right must have been "particularized"—"the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. at 1212 (quoting Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987)).

The right at issue here was sufficiently particularized by August 1989, the time of Chan's transfer, to hold the individual defendants liable if they are found to have violated that right. Gardner, 392 U.S. 273, 278-79, 88 S.Ct. 1913, 1916, 20 L.Ed.2d 1082 (1968), and Lefkowitz, 431 U.S. 801, 806, 97 S.Ct. 2132, 2136, 53 L.Ed.2d 1 (1977), clearly established that no adverse actions could be taken against police officers for asserting the Fifth Amendment in inquiries unrelated to their official duties. Retaliatory transfers were held to violate the First Amendment in McGill v. Board of Educ., 602 F.2d 774, 780 (7th Cir.1979). See Greenberg v. Kmetko, 922 F.2d 382, 385 (7th Cir.1991) (proper treatment of "lateral arabesque" made "apparent" in McGill). A reasonable person should have known at least by McGill that a police officer could not be transferred for asserting his Fifth Amendment rights. The defendants are therefore not entitled to qualified immunity from the claim asserted in Count One.

Counts Three and Four allege equal protection violations based on unequal treatment between Chan and police officers of non-Chinese ancestry. To plead an equal protection claim, Chan must allege that because of his membership in a particular class, the defendants intentionally treated him differently from similarly situated police officers who were not class members. Sims v. Mulcahy, 902 F.2d 524, 538 (7th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 249, 112 L.Ed.2d 207 (1990); Gray v. Lacke, 885 F.2d 399, 414 (7th Cir.1989), cert. denied, ___ U.S. ___, 110 S.Ct. 1476, 108 L.Ed.2d 613 (1990). In Count Three, Chan alleges that, in contrast to his transfer, police officers not of Chinese ancestry who asserted the Fifth Amendment before the same federal grand jury as did Chan were not transferred or otherwise disciplined in any manner. He does not, however, allege that he was transferred because of his Chinese ancestry, and therefore the class-based motivation element is lacking. Count Three is dismissed.

Count Four alleges that Chan was "actually and constructively disciplined" without prior notice and an opportunity to be heard, which could partially support a procedural due process claim. That count, however, asserts a Fifth and 14th Amendment equal protection claim, but lacks the necessary elements for such a claim. Count Four is therefore dismissed.

Count Five is similarly deficient. It alleges that Chan suffered "a severe stigma on his professional and personal reputation" which destroyed his future prospects in law enforcement and spurred his decision to pursue another profession. The count is vague and does not specify what type of claim it asserts or the law under which the claim is asserted. It therefore fails to satisfy

the pleading requirements of Fed.R.Civ.P. 8(a)(2) and is dismissed.

Count Seven alleges that the defendants' violations of Chan's rights, as set forth in prior counts, were committed "willfully, unlawfully, maliciously and in wanton disregard of the rights and feelings of plaintiff" and seeks punitive damages. The count, however, fails to state a specific cause of action or legal authority allowing for punitive damages. Count Seven is therefore dismissed for failure to comply with Rule 8(a)(2).

The court reserves its ruling on the motion to dismiss as it pertains to Count Six, a pendent state claim for breach of contract.

CONCLUSION

For the above reasons, the City of Chicago, the official capacity claims against the individual defendants, and Counts Two, Three, Four, Five and Seven of the complaint are all dismissed without prejudice. The Chicago Police Department is dismissed with prejudice.

IT IS SO ORDERED.

APPENDIX G

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 29, 1997

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. ILANA DIAMOND ROVNER, Circuit Judge

CORY D. CHAN,

Plaintiff-Appellant, Cross-Appellee,

No. 96-1683, 96-1784 v.

EDWARD S. WODNICKI, individually and in his former capacity as Deputy Superintendent of the Chicago Police Department,

Defendant-Appellee, Cross-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 91 C 4671—Elaine E. Bucklo, Magistrate Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc* filed on September 12,

---

* Judge Joel M. Flaum took no part in consideration of this petition for rehearing en banc.

1997 by plaintiff-appellant/cross-appellee, no judge in active service has requested a vote thereon, and the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing en banc be, and the same is hereby DENIED.